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BEFORE

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AND THE

COURT OF APPEAL IN CHANCERY.

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CHANCERY FUNDS RULES, 1872.

1872

RULES

UNDER

THE COURT OF CHANCERY (FUNDS) ACT, 1872,

35 & 36 VICT. c. 44.

Issued 21st day of December, 1872.

Revoked except Rule 1 by Chan Funds Consolidated Rules 1874 wch came into operation on 11 Jany 1875. LR9 Ch xxix

THE RIGHT HONOURABLE ROUNDELL BARON SELBORNE, Lord High Chancellor of Great Britain, with the concurrence of the Commissioners of Her Majesty's Treasury, doth hereby in pursuance of the powers contained in "The Court of Chancery (Funds) Act, 1872," and of every other power enabling him in that behalf, make the following Rules:—

Commencement of Act and Rules.

1. The Court of Chancery (Funds) Act, 1872, shall come into operation on the 7th day of January, 1873, and these Rules shall come into operation on the same day (which day is in these Rules referred to as the commencement thereof), and shall be filed in the Report Office of the High Court of Chancery, and may be cited as the "Chancery Funds Rules, 1872."

Interpretation of terms.

Revoked as above & for new rule republg same with alteration see do r 2. LR9 Ch xxix

2. In these Rules and in Orders as herein defined, terms shall have the same meaning as the same terms in the said Act, and the term "Court" shall mean the Court of Chancery, and the term "Order" shall mean an Order of the Court of Chancery; intituled in a cause or matter in the said Court, and made by a Judge thereof, whether sitting in Court or at Chambers, or as to payments out of the "Appeal Deposit Account" an Order made on a non-attendable Petition presented to the Lord Chancellor; and the

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term "Order" shall include a decree and a report of a Master in Lunacy confirmed by fiat; and the term "Chief Clerk's Certificate" shall mean a certificate intituled in a cause or matter in the said Court, and made by a Chief Clerk of a Judge of the said Court, and approved and signed by a Judge thereof; and the term "Title of the Cause" shall, with respect to causes commenced since 1st November, 1852, in these Rules, mean the short title of the cause with the reference to the Record as prescribed by the first of the Consolidated Orders of the Court, Rule 48, in the following form, viz., (A. *v.* B. 1872. A. 100); and the term "Cause or Matter" shall, in these Rules, include a separate account in a cause or matter, and a matter intituled merely as an account; and the term "Bank" shall mean Bank of England or Governor and Company of the Bank of England; and the term "Paymaster General" shall mean Her Majesty's Paymaster General for the time being, or his Assistant for the time being acting on his behalf for Chancery business; and the term "Chancery Pay Office" shall mean Paymaster General's Office for Chancery business; and the term "Chancery Pay Office Account" shall mean the account at the Bank of the Paymaster General for the time being on behalf of the Court of Chancery; and words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number; and words importing the masculine gender shall include females.

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62 of Ch xxxi

Abrogation of certain Orders in Chancery and in Lunacy

3. Rules 14, 15, and 16 of the first of the Consolidated Orders of the Court, and Rule 5 of the fifth of the same Orders, and the 49th, 50th, and 51st of the General Orders in Lunacy of 7th November, 1853, are hereby abrogated.

Construction of existing Orders.

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4. Orders of the Court made before the commencement of these Rules, containing directions not then carried into effect for the payment of money into, or deposit of securities in the Bank with the privity of the Accountant General to the credit of a cause or matter, or for the transfer of securities into the name and with the privity of the Accountant General in trust in a cause or matter, shall be read and construed as if they directed such money or securities respectively to be paid or transferred into, or deposited

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in Court to the credit of the same cause or matter, and no declaration of trust shall be required to be made with respect to any of such securities.

Mode of intituling certain Orders, and exact titles of accounts to be stated.

5. Every Order directing money or securities in Court to be dealt with, shall be intituled in the cause or matter, but not to the separate account, to the credit of which such money or securities shall be placed in the books at the Chancery Pay Office; and every such Order shall state, in the body of such Order and not merely by reference to the title of it, the exact title of the cause or matter and separate account, if any, to the credit of which the money or securities dealt with shall be remaining, or to the credit of which the money or securities not already in Court shall be directed to be placed.

Revoked by Chan Funds Consol Rules 1874 r. 1 but republished with alterations by r. 7

WM 75 [illegible]

Exact amount of funds to be expressed, and sources of uncertain funds to be stated.

6. Every such Order as referred to in the last preceding Rule, shall express the exact amount of money or securities to be dealt with whenever it can be ascertained, and the amount of money or securities standing in the books at the Chancery Pay Office at the date of such Order, to the credit of the cause or matter to which the money or securities to be dealt with may be remaining, and not merely by reference to another Order; but if the money or securities, or the dividends thereof, to be so dealt with under any such Order, shall not be in Court at the date thereof, the source from which such money or securities will be derived shall be stated; and in every case the exact amount of money to be dealt with by the Paymaster General shall be expressed in an Order or in a Chief Clerk's certificate, or in a certificate of a Taxing Master, or in a certificate of a Master in Lunacy, unless the amount to be dealt with be payable for legacy or succession duty, or be described as dividends to accrue on securities in Court, or as interest on money on deposit, or as money to arise by the sale or conversion of securities in Court, or as the residue of such dividends, interest, or money, respectively, after deducting an amount expressed in an Order or in such a certificate, or as an aliquot part of such dividends, interest, money, or residue, respectively.

Revoked by Chan Funds Consol Rules 1874 r. 1 but republished with alterations by r. 8

WM 75 [illegible]

Mode of framing certain Orders.

7. When an Order directs the payment, transfer, or delivery of money or securities in Court, and the amounts to be paid, trans-

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ferred, or delivered, are mentioned in a Schedule to such Order, the total of such amounts shall be expressed in words at length in the body of the Order; and whenever the dealing by the Paymaster General with money or securities in Court is by an Order, made contingent upon the execution of some document, the document and the parties thereto by whom it is to be executed, shall be clearly indicated in an Order, or certificate of a Master in Lunacy, or in a Chief Clerk's certificate, and the execution of such document shall be certified by a Chief Clerk of a Judge of the Court, or by a Master in Lunacy, unless the Judge upon making the Order by which such execution is required shall otherwise expressly direct.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib rr 9, 11
[illegible] 13

Period of computation and rate of interest to be defined.

8. When interest is, in pursuance of an Order to be acted on by the Paymaster General, to be computed otherwise than by the Chief Clerk of a Judge of the Court, or by a Master in Lunacy, the Order shall state the days or times from and up to which the interest is to be computed, and the rate per cent. of such interest, and whether or not income-tax is to be deducted.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 10
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Proceedings on payment and deposit of money and securities.

9. When money or securities are to be paid into, or deposited in, Court, such payment or deposit shall be made with the privity of the Paymaster General, and the Paymaster General shall issue a direction to the Bank to receive and place the same to the credit of the Chancery Pay Office Account; and such direction shall specify the title of the cause or matter to which such money or securities are to be placed in the books at the Chancery Pay Office, and upon such money or securities being so paid or deposited, the Bank shall cause a receipt to be given for the same, and shall send such direction to the Chancery Pay Office, with a certificate thereon, that the money or securities therein specified have been received, and placed to the credit of the Chancery Pay Office Account.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 28
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Payment, deposit, and transfer on request.

10. Money and securities may be paid or transferred into, or deposited in, Court, and be placed in the books at the Chancery Pay Office to the credit of a cause or matter, on a direction to be obtained from the Paymaster General upon the written request of the person desirous of so paying, transferring, or depositing, or of

Revoked by Chan Funds Consold Rules 1874 r 1, but republished with alterations by ib r 25
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his solicitor, without an order; but no such payment, transfer, or deposit shall be so made to a separate account in a cause (except to a security for costs account), unless such separate account has been directed to be opened by an Order made either before or after the commencement of these Rules, and such request shall be filed in the Report Office. This Rule shall not apply to money, or securities, directed by an Order to be paid or transferred into, or deposited in, Court, nor to money or securities payable or transferable into Court, in pursuance of an Act of Parliament, or a general Order of the Court, by which some particular authority to enable the payment, transfer, or deposit to be made is required.

Request to contain reference to Record.

Revoked by Cha
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11. Every request for a direction for payment or transfer into, or deposit in, Court of money or securities to be placed to the credit of a cause commenced since 1st November, 1852, shall contain the title of the cause and the reference to the Record as cited in the preceding Rule 2, and the correctness of such reference shall be authenticated by the Official Seal of the Clerks of Records and Writs being impressed on such request.

Mode of lodging money at the Bank in urgent cases.

Revoked by
Chan Fund
Consold Rule
1874 & then
republished
with alteration
by r. 31
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12. When it is desired to bring money into Court without waiting the time necessary to obtain a direction for the Bank to receive the same it may be lodged at the Bank to the credit of a Chancery Suspense Account (subject to being dealt with as hereinafter mentioned, and not otherwise), upon a written application signed by the person desiring to lodge the same, or his solicitor, and addressed to the Bank; and in such application shall be specified the amount to be lodged, and the title of the cause or matter in Chancery in respect of which the lodgment is desired to be made, and upon such lodgment being made one of the cashiers of the Bank shall give a certificate that the amount has been lodged to the credit of the Chancery Suspense Account; and in every case the person making such lodgment, or his solicitor, shall forthwith bespeak the direction for the Bank to receive the money in the manner provided by the preceding Rule 9, and produce such direction and certificate at the Bank, for the purpose of having the money so previously lodged transferred to the Chancery Pay Office Account, and placed in the books at the Chancery Pay Office to the credit

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of the cause or matter mentioned in such direction, and the receipt mentioned in the said Rule 9 shall thereupon be given for such money.

When money paid in under sect. 69 of "Lands Clauses Act, 1845," the disability is to be stated.

Revoked by Chan Funds Consold Rules 1874 r1, but republished with alteration by ib r 32

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13. Money hereafter paid into Court pursuant to the 69th section of the "Lands Clauses Consolidation Act, 1845," in respect of lands in England or Wales, shall be placed in the books at the Chancery Pay Office to the credit of Ex parte the Promoters of the undertaking, in the Matter of the special Act (citing it), as directed by the said Lands Clauses Consolidation Act, 1845, and some words shall be added in each case briefly expressive of the nature of the disability to sell and convey, by reason of which the money shall be so paid in, as stated in the request for the direction to receive the money.

When money paid in under the Copyhold Acts, the disability is to be stated.

Revoked by Chan Funds Consol Rules 1874 r1 but republished with alteration by ib r 33

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14. Money hereafter paid into Court pursuant to the Copyhold Acts, shall be placed in the books at the Chancery Pay Office to the credit of "Ex parte the Copyhold Commissioners," as directed by the said Acts, and in addition thereto, to the account of the particular manor in respect of which the money shall be so paid in; and in the request for a direction to receive such money the name and locality of such particular manor shall be stated.

Proceedings on transfer of securities into Court.

Revoked by Chan Funds Consold Rules 1874 r1 but republished with alterations by ib r 29

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15. When securities are to be transferred into Court, such transfer shall be made with the privity of the Paymaster General, and the Paymaster General shall issue a direction for the transfer to be made to the account of the Paymaster General for the time being on behalf of the Court of Chancery; and such direction shall specify the title of the cause or matter to which such securities are to be placed in the books at the Chancery Pay Office; and upon such securities being so transferred, the Bank, or body corporate, or company, in whose books the transfer of such securities is made or registered, shall send such direction to the Chancery Pay Office with a certificate thereon that the securities therein specified have been transferred to the said account.(1)

Receipt and certificate of payment, deposit, and transfer.

16. When any such direction as is mentioned in Rules 9 and 15, with a certificate thereon that the amount of money or securities therein mentioned has been so paid or transferred, or deposited,

(1) See Re Stephens L.R. 8 Ch. 465 [illegible]

shall be received at the Chancery Pay Office, the Paymaster General shall file a certificate of such payment, transfer, or deposit, and shall therein state the title of the cause or matter to which such amount of money or securities has been placed in the books at the Chancery Pay Office; and an office copy of such certificate of the Paymaster General shall be received as evidence of the payment or transfer into, or deposit in, Court therein mentioned having been made.

1872

Revoked by
Chan Funds
Consold Rules
1874 r 1 but
republished w
alteration by
id r 30
W N 75 (P D) 11, 14

Funds in Court not to be dealt with except in pursuance of an Order.

17. Securities in Court shall not be sold, transferred, or delivered out, and money in Court shall not be paid out or invested in securities (except in the case provided for by Rule 3 of the 41st of the Consolidated Orders of the Court, and in the case provided for by the 40th of these Rules), and money or securities in Court shall not be carried over, and a certificate shall not be issued for the sale, transfer, or delivery of securities in Court, unless in pursuance of an order, or of a certificate of a Master in Lunacy, as authorized by the Lunacy Regulation Act, 1853, and any General Orders made thereunder.

Revoked by
Chan Funds
Consold Rules
1874 r 1 but
republished w
alteration by
id r 36
W N 75 (P D) 11, 15

Payment of money out of Court.

18. When money in Court is to be paid out (except in the cases hereinafter provided for), the Paymaster General shall cause a cheque to be prepared, stating the title of the cause or matter in the books at the Chancery Pay Office to which the money paid is to be debited, the date of the Order or other authority in pursuance of which, and the name of the person to whom, the payment is to be made, and such other particulars of such payment as the Paymaster General may deem necessary; and such cheque, duly endorsed by the payee named therein, or his lawful attorney, shall be a good discharge to the Paymaster General for the amount therein mentioned.

Revoked by
Chan Funds
Consold Rules
1874 r 1 but
republished an
alteration by
id r 38
[illegible]

Continuation of periodical payments.

19. Money in Court periodically payable at the commencement of these Rules, shall continue to be payable by the Paymaster General in pursuance, and on the authority, of the entries of the cheques for periodical payments in the receipt books in the Accountant General's Office, or of such other documents as the Accountant General has been accustomed to use in the preparation of such cheques, without the production of the Orders and

Revoked by
Chan Funds
Consold Rules
1874 r 1
but republ
with alterat
by id r 39
[illegible]

1872

other documents in pursuance whereof such payments are made, being necessary.

Renewal of unpaid cheques of the Accountant General.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by do r 40

[illegible]

20. When cheques have been signed by the present Accountant General, or by any of his predecessors, but have not been paid at the Bank previously to the commencement of these Rules, such cheques shall be a sufficient authority to the Paymaster General to cause payments to be made to the same persons and of the same amounts as are named therein, without the production of the Orders or other documents in pursuance whereof such cheques have been so signed, being necessary.

Substitution of transfers for payments to official persons.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alteration by do r 41

[illegible]

21. When money in Court is payable to the Ecclesiastical Commissioners for England, the Official Trustees of Charitable Funds, the Official Liquidator of any Company, the Commissioners for the Reduction of the National Debt, or to any other official persons for whom an account is kept at the Bank, the Order shall direct the amount so payable to be transferred, upon the requisition of the official persons to whom it is due, to the proper account (citing it), at the Bank, of such official persons. And the Paymaster General shall, upon receiving such requisition, direct the Bank to write off from the Chancery Pay Office Account the amount so payable, and to place it to the account at the Bank mentioned in such Order, and shall debit the proper account in the books at the Chancery Pay Office therewith.

Payment and transfer to representatives of deceased persons.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alteration by do r 53

[illegible]

22. When money in Court is payable, or securities in Court are transferable or deliverable to any person named or described in an Order (except to a person therein expressed to be entitled as a trustee, executor, or administrator, or entitled in any character other than in his own right), the same, or any portion thereof for the time being remaining unpaid or untransferred or undelivered, may, on proof of the death of such person, whether before, on, or after the date of such Order, be paid or transferred or delivered to the legal personal representatives of such deceased person, or to the survivors or survivor of them; and when money in Court is by an Order directed to be paid to any persons described in an Order or a Chief Clerk's certificate as co-partners, such money may be paid to any one or more of such co-partners. (1)

(1) See Chapman and Chapman L R 17 Eq 350 MR.

1872

Paymaster General may defer acting on directions in Orders without request.

23. When an Order, or a certificate of a Master in Lunacy, directs the carrying over of money or securities in Court, or the investment, or placing on deposit (subject to Rule 52), or payment out of money in Court, the Paymaster General may defer giving effect to such direction until a request in writing to give effect thereto has been left at the Chancery Pay Office; but it shall be the duty of the solicitor for the person having the carriage of such Order or certificate to leave it and such request at the Chancery Pay Office without unnecessary delay.

Revoked by Cha
Funds Consol
Rules 1874 r 1
but republished
ib r 37 with altera
[illegible] 11, 1

Investment of money.

24. When money in Court is, in pursuance of an Order as defined by the 2nd of these Rules, or of Rule 3 of the 41st of the Consolidated Orders of the Court, or of a request as provided for by the 40th of these Rules, to be invested in specified securities, the Paymaster General shall direct the money to be paid to the broker conditionally upon his causing such securities to be transferred or deposited to the account of the Paymaster General for the time being on behalf of the Court of Chancery, and the cheque for such money shall specify the title of the cause or matter to which the securities purchased are to be placed in the books at the Chancery Pay Office; and the Bank, or body corporate, or company, in whose books or with whom the transfer or deposit of such securities shall be made or registered, shall cause a certificate of such transfer or deposit to be issued, and such a certificate purporting to be issued by the Bank, or body corporate, or company aforesaid, shall be sufficient evidence, for all purposes, that such transfer or deposit as therein mentioned has been actually made; and the securities so transferred or deposited shall be placed in the books at the Chancery Pay Office to the same credit as that to which the said money was standing at the time of such investment, unless the Order authorizing such investment shall otherwise direct.

Revoked by
Chan Fund
Consold Rule
1874 r 1
but republe
with alterat
by ib r 60
[illegible]

Sale of securities.

25. When securities in Court are to be sold, the Paymaster General shall issue a direction to the Bank to receive the proceeds of such sale, and to place them to the Chancery Pay Office Account, and shall specify in such direction the title of the cause or matter to the credit of which such proceeds are to be placed in the books

Revoked by
Chan Funds
Consold Rul
1874 r 1 bu
republished
with alterati
by ib r 43.
[illegible]

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See last page

at the Chancery Pay Office, and such title shall be the title of the cause or matter to the credit of which the securities were standing at the time of such sale; and the Bank, or body corporate, or company, in whose books, or with whom, the securities to be sold are standing or deposited, shall, upon the production of the receipt from the Bank for the proceeds of the sale, and of a certificate of a Registrar of the Court, or a Master or Registrar in Lunacy, countersigned by the Paymaster General, authorizing such sale, cause the transfer or delivery of the securities necessary to complete the sale, to be made by their proper officer.

Transfer of securities out of Court.

Revoked by Chan Funds Consold Rules 1874 r 1, but republished with alteration by do r 45

26. When securities in Court are to be transferred or delivered out, the Paymaster General shall issue a direction for such transfer or delivery, and specify in such direction the title of the cause or matter to the credit of which such securities shall be standing in the books at the Chancery Pay Office, and the amount and description of the securities to be transferred or delivered, and the name of the person to whom the transfer or delivery is to be made; and upon the receipt of such direction, and of a certificate of a Registrar of the Court, or a Master or Registrar in Lunacy, countersigned by the Paymaster General, authorizing such transfer or delivery, the Bank, or body corporate, or company, in whose books, or with whom, such securities shall be standing or deposited, shall cause such transfer or delivery to be made by their proper officer, and shall send such direction to the Chancery Pay Office, with a certificate thereon that the transfer or delivery therein mentioned has been made to the person named therein.

Application of dividends accruing thereon.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alteration by do rr 467-9

27. When securities in Court are directed to be transferred or delivered out, dividends accruing thereon subsequently to the date of the Order directing the transfer or delivery (when the amount of the securities to be transferred or delivered is specified in such Order, or, if not so specified, then subsequently to the time when the amount of such securities is ascertained), shall be paid to the persons to whom the securities are to be transferred or delivered, unless such Order otherwise directs. And when, pursuant to a general or other previous Order, dividends have been invested, which, but for such investment, would, under the Order directing

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the transfer or delivery, be payable to the persons to whom the securities on which they have accrued are directed to be transferred or delivered; the securities purchased with such dividends, and any dividends accrued in respect thereof, shall, unless otherwise directed, be transferred or delivered and paid to the same persons; and the Registrars of the Court, and the Masters and Registrar in Lunacy, may, upon production to them of a certificate of such investment, issue certificates for such transfer or delivery; and when securities in Court are directed to be realised, and the whole of the proceeds paid out or carried over in one sum or in aliquot parts, any dividends accruing on such securities subsequent to the date of the Order directing the realisation, if the amount of such securities is specified in the Order, or, if not so specified, subsequent to the time when such amount is ascertained, shall be added to such proceeds, and applied in like manner therewith, unless such Order otherwise directs.

Conversion of securities substituted for sale.

Revoked b
Chan Fund
Consol Rul
1874 r 1 bu
republished
by r 44
with alteration

28. When a specific amount of Government securities in Court (consisting of not less than £1000 Consolidated £3 per Centum Annuities, or £1000 Reduced £3 per Centum Annuities, or £1000 New £3 per Centum Annuities) shall be required to be realised, the Order, instead of directing a sale of such securities, shall direct the same to be converted into cash, unless the Court on pronouncing such Order shall otherwise direct, and thereupon such securities shall be transferred to the Commissioners for the Reduction of the National Debt on behalf of the Court of Chancery, as provided by the 52nd of these Rules, and no such conversion shall be made of an amount less than £1000 of such securities, except for the purpose of placing on deposit the value of such securities.

Certificates for sale, &c., of securities.

Revoked by
Chan Funds
Consold Rule
1874 r 1 but
republished as
with alteration
by r 42

29. Every certificate for the sale, transfer, or delivery of securities in Court shall express the exact amount of money to be raised by sale, or the exact amount and description of securities to be sold, transferred, or delivered out; and no such certificate shall be issued by a Master in Lunacy, except on the production of an office copy of the report of a Master in Lunacy confirmed by fiat; nor by the Registrar in Lunacy, except on the production of an office copy of the Order in Lunacy; nor by a Registrar of the Court, except on

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the production of the original Order, or an office copy thereof, if the absence of the original Order shall be accounted for to the satisfaction of such Registrar.

Certificates of fund in Court.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 87. 88

[illegible]

30. The Paymaster General, upon a request in writing made by or on behalf of a person claiming to be interested in money or securities standing in the books at the Chancery Pay Office to the credit of a cause or matter stated in such request, may, in his discretion grant, for the information of a Judge or an officer of the Court, a certificate of the amount and description of such money or securities, and such certificate shall have reference to the morning of the day of the date thereof, and not include the transactions of that day, and the Paymaster General shall notify on such certificate the dates of any Orders restraining the transfer, sale, delivery out, or payment, or other dealing with the securities or money in Court to the credit of the cause or matter mentioned in such certificate, and any charging Orders, affecting such securities or money, of which respectively he has had notice; and when a cause or matter has been inserted in the list referred to in Rule 54, the fact shall be notified on the certificate relating thereto, and the Paymaster General may also, in his discretion, upon a like request, grant a transcript of the account in any cause or matter in the books at the Chancery Pay Office.

Certificates of purchases, sales, &c.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 89 11 M 75/1711 II, 11, 19

31. When securities have been purchased, sold, transferred, or delivered out, or money or securities have been carried over, or otherwise dealt with in the books at the Chancery Pay Office, the Paymaster General may in his discretion issue a certificate thereof, upon a request in writing made by or on behalf of any person claiming to be interested in such money or securities.

Information as to transactions.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 90 11 M 75/1711 II r. 19

32. The Paymaster General may in his discretion, on a request in writing, supply such information with respect to any transactions in the Chancery Pay Office, as may from time to time be required in any particular case.

Placing of money on deposit.

33. Subject to any exceptions in these Rules, money in Court paid in before the commencement of the Court of Chancery (Funds) Act, 1872 (other than money paid in pursuant to the

Copyhold Acts, or to the 69th section of the Lands Clauses Consolidation Act, 1845), and money arising by the sale, conversion, or payment off of securities in Court, or dividends accruing on securities in Court, or money brought over from the credit of some other cause or matter or otherwise placed, either before or after such commencement, to the credit of a cause or matter in the books at the Chancery Pay Office, shall be placed on deposit on a request in writing to the Paymaster General signed by any person claiming to be interested in such money, or by his solicitor; and, subject as aforesaid, all money paid into Court after the commencement of the Court of Chancery (Funds) Act, 1872, shall be placed on deposit without a request for that purpose.

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Revoked by Chan Funds Consold Rules 1874 r 1, but republished by do r 68 with alterations

W.N. [illegible]

34. If a direction in an Order dealing with money in Court otherwise than by directing it to be placed on deposit, whether such money has been paid in before or after the commencement of the Court of Chancery (Funds) Act, 1872, is brought under the notice of the Paymaster General, or if a request in writing by a solicitor acting on behalf of any person claiming to be entitled to or interested in money in Court, paid in after the commencement of the same Act, that such money may not be placed on deposit, is left at the Chancery Pay Office, such money respectively shall not be placed on deposit, but the person making such request may at any time withdraw the same, and by a like request in writing require the money to be placed on deposit.

Money not to be placed on deposit in certain cases.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alteration by do r 69

WN (75) [illegible]

35. Money in Court shall be placed on deposit as soon as conveniently may be after it is paid in, or, when a request to place it on deposit is required, according to the last two preceding Rules, as soon as conveniently may be after such request is left at the Chancery Pay Office, but the placing of money in Court on deposit shall not be deferred beyond the last day of the month in which the money shall be paid into Court, or in which the request shall be left at the Chancery Pay Office.

Time of placing money on deposit.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alteration by do r 70

W.N. [illegible]

36. Money in Court paid in in pursuance of the Act of the session of the ninth and tenth years of the reign of Her present Majesty, chapter twenty, intituled "An Act to amend an Act of

Exclusion of money paid in under 9 & 10 Vict. c. 20,

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or to the Appeal Deposit Account.

Revoked by Chan Funds Consol Rules 1874 r 1 but repubd with alteration by ib r 72 W.N. 75 Pt II 11, 18

the second year of Her present Majesty, providing for the custody of certain moneys paid in pursuance of the Standing Orders of either House of Parliament by subscribers to works or undertakings to be effected under the authority of Parliament," or of any Act amending the same, or money in Court paid in to the Appeal Deposit Account, shall not be placed on deposit.

Limitation of amount to be placed on deposit.

Revoked by Chan Funds Consol Rules 1874 r 1, but republed by ib r 73 with alterations W.N. 75 Pt II [illegible]

37. Except in the case of money paid into Court to the credit of a cause, or matter, to the credit of which money on deposit shall be standing at the time of such payment, a sum of money less than £3 shall not be placed on deposit, nor shall a sum of money less than £3 remain on deposit.

Limitation of amount to be invested.

Revoked by Chan Funds Consol Rules 1874 r 1, but republed with alteration by ib r 64 [illegible]

38. A sum of money in Court less than £100 shall not be invested in pursuance of an Order made after the commencement of these Rules, unless such Order shall direct the investment to be made notwithstanding that the sum shall not amount to £100.

This Rule shall extend to the investment of dividends accruing on securities in Court, which, by an Order, have been, or may be, directed to be invested, and such dividends, when amounting to less than £100 half-yearly, are (subject to Rule 37) to be placed on deposit until by accumulation they amount to a sum not less than £100, when such sum shall, upon a request in writing by or on behalf of any person claiming to be entitled thereto or interested therein, be withdrawn from deposit and invested as directed by such Order.

Withdrawal of money on deposit.

Revoked by Chan Funds Consold Rules 1874 r 1 but republed by ib r 74 with alterations [illegible]

39. When an Order containing directions dealing with money on deposit, or with money which after the date of the Order has been placed and still remains on deposit, is brought to the Chancery Pay Office to have such directions acted on, such money, or so much thereof as may be sufficient to meet the requirements of the Order, may, on a request in writing signed by a person claiming to be entitled thereto or interested therein, or by a solicitor acting on his behalf, be withdrawn from deposit and applied as directed by the Order, subject, as to investment of money, to the last preceding Rule.

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Money paid in under 36 Geo. 3, c. 52, may be invested on request.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 65

40. Rule 11 of the 1st of the said Consolidated Orders is hereby abrogated: Provided that the dividends accruing on securities purchased as mentioned in such Rule, previously to the commencement of these Rules, may (subject to Rule 38) be invested in like manner as if the said Rule 11 had not been abrogated.

And, for the said Rule 11 so abrogated, the following Rule shall be substituted:—

Any money, amounting to or exceeding £100, paid into the Bank pursuant to the Statute 36th George 3rd, c. 52, s. 32, shall, upon a written request of the person so paying it in, or his solicitor, or upon a written request made by or on behalf of any person claiming to be entitled thereto or interested therein, be invested by the Paymaster General, without any Order for that purpose, in Consolidated £3 per Centum Annuities, and the dividends on such annuities, and all accumulations thereon, shall (subject to Rule 38) be invested in like manner, without any Order for that purpose, and if such money shall have been placed on deposit before such request shall be left at the Chancery Pay Office, the money and any interest thereon shall, upon a like request, be withdrawn from deposit, and invested as before mentioned.

Investing or placing on deposit discontinued on request.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 67.

41. In all cases, upon a request in writing by a solicitor acting on behalf of any person claiming to be entitled to or interested in money or securities in Court, that no more dividends or interest accruing on any particular securities, or on any specified sum of money on deposit, may be placed on deposit, or invested, being at any time left at the Chancery Pay Office, the Paymaster General shall be at liberty to cease to place on deposit, or invest, any more dividends or interest accruing on such securities or on such specified sum, until he has had notice that the Court has made some order in that behalf.

Limit of amount on which interest is to be computed.

42. Interest upon money placed on deposit shall not be computed on a fraction of one pound.

Time at which interest is to begin and cease.

Revoked by Chan Funds Consold Rules 1874 but republished with alterations by ib r 76

43. Interest shall accrue by calendar months, and shall not be computed for a broken period of a calendar month, and shall begin on, and be computed for, the first day of the calendar month next

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after the money shall be placed on deposit, and when interest shall accrue under this rule such interest shall be computed up to, and inclusive of, and shall cease on, the last day of the calendar month which shall next precede the day on which the money in respect of which it shall accrue, shall be withdrawn from deposit.

Revoked by Chan Funds Consold Rules 1870 but republished by do r. 77 with alterations
[illegible] 11, 18

Time at which interest is to be credited.

44. Interest due on the 31st of March and the 30th of September in every year, on money then on deposit, shall be credited by the Paymaster General to the cause or matter to the credit of which such money is standing, on or before the 20th day of the following month; and when money on deposit, or any part thereof, shall be withdrawn from deposit (except as to money withdrawn during the months of April and October) the interest accrued, but not credited, on the money withdrawn shall be credited, at the time of withdrawal, to the cause or matter to the credit of which the money shall be standing at the time it shall be withdrawn.

Revoked by Chan Funds Consold Rules 1874 r. 1 but republished by ib r. 78 with alterations
[illegible] 11. 10. 19

Rule as to sums to be treated as withdrawn from deposit for the purpose of calculating interest.

45. When money on deposit standing to the credit of a cause or matter consists of sums which have been placed on deposit at different times, and an Order is made for dealing with the money standing to the credit of such cause or matter, and part of such money has to be withdrawn from deposit for the purpose of executing such Order, the part or parts of such money last placed and remaining on deposit at the time of such withdrawal, shall, for the purpose of computing interest, be treated as so withdrawn, unless the order shall otherwise direct.

Revoked by Chan Funds Consolde Rules 1874 r. 1 but republished with alterations by do r 79
WMC75/101D, 11, 19

Placing of interest on deposit.

46. Until a direction in an Order dealing with interest on money on deposit, credited to a cause or matter as due on either of the days mentioned in Rule 44 has been brought under the Paymaster General's notice, such interest shall (subject to Rule 37) be placed on deposit, and shall be treated as placed on deposit on the day on which it shall be due.

Revoked by Chan Funds Consold Rules 1874 r. 1 but republished with alterations by do r 80
WMC75/101D, 11, 19

Application of interest on money on deposit directed to be invested.

47. When an Order directs money in Court to be invested, and subsequently to the date of such Order the money shall have been placed on deposit, interest accruing in respect of such money may be applied in the same manner as the dividends arising from such investment are directed to be applied.

Revoked by Chan Funds Consold Rules 1874 r. 1, but republished with alterations by do r. 57
WMC75/101D, 11, 18

Revoked by Chan Funds Consolidd Rules 1874 r1. but republished with alteration by ib r75 [illegible]

48. When money on deposit is by an Order directed to be dealt with, such money shall be withdrawn from deposit as soon as may be after a request in writing for such withdrawal has been left at the Chancery Pay Office, but such withdrawal shall not be deferred beyond a week after the leaving of such request.

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Limit of time for withdrawal from deposit.

49. The Paymaster General shall from time to time, but not oftener than once a week, place in the hands of the Commissioners for the Reduction of the National Debt, any excess of the common and general cash of the suitors of the Court beyond the amount which in his opinion is required for the purpose of making current payments, and for that purpose the Paymaster General shall send to the Bank a direction to write off from the Chancery Pay Office Account, and to place to the credit of the account of the said Commissioners on behalf of the Court of Chancery, the amount of cash specified in such direction, and shall send to the said Commissioners a notification thereof.

Transfer of surplus cash to Commissioners for Reduction of National Debt.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 81
WM(75)1014 11.19

50. When the Paymaster General shall require, for the purpose of making current payments, any money placed in the hands of the said Commissioners, he shall send to them a request in writing to pay the sum of money specified in such request, and the said Commissioners shall, within one week after the receipt by them of such request, cause the Bank to place to the credit of the Chancery Pay Office account the sum specified in such request.

Repayment by Commissioners for Reduction of National Debt.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 82
[illegible] 11.19

51. The said Commissioners shall, as soon as may be after the 6th of April and 6th of October in every year, credit the account to be kept by them of moneys placed in their hands by the Paymaster General on behalf of the Court of Chancery with such sum as the Paymaster General shall certify to be the amount of the interest which has accrued during the six calendar months preceding the 1st of April and the 1st of October respectively on money on deposit, and shall cause the amount of Income Tax chargeable on such interest to be paid over to the Receiver General of Inland Revenue.

Crediting of interest by Commissioners.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 83
[illegible]

52. When Government securities in Court (consisting of Consolidated £3 per Centum Annuities, or Reduced £3 per Centum Annuities, or New £3 per Centum Annuities), are by an Order

Conversion of Government securities.

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Revoked by Chan Funds Consold Rules 1874 & but republished with alteration by ib r 17A. 84
[illegible]

directed to be converted into cash, a Registrar of the Court, or a Master or Registrar in Lunacy, shall issue a certificate for the transfer of such securities to the Commissioners for the Reduction of the National Debt on behalf of the Court of Chancery, and the Paymaster General, upon receiving such certificate, shall send to the said Commissioners a notification that such transfer will take place, with a request that the amount of cash which is the value of such securities, according to the average price thereof on the day of transfer, or (if there should happen to be no average price on that day) on the next following day on which there shall be an average price thereof, may be placed to the account to be kept by the said Commissioners of money placed in their hands by the Paymaster General, such value to be determined by the said Commissioners in the manner provided by the next following Rule. And the Paymaster General, upon receiving a certificate from the said Commissioners that the amount of cash which is the value of such securities, determined as aforesaid, has been placed to the account of money due from them to him, shall credit the account in the books at the Chancery Pay Office upon which such securities were standing at the time of the transfer, with such cash; and when such cash shall be directed by the Order to be placed on deposit, it shall be deemed to have been placed on deposit, without a request for that purpose, on the day on which the securities in respect of which it shall be due from the said Commissioners were transferred to them.

Ascertaining value of Government securities.

Revoked by Chan Funds Consold Rules 1874 & but republished with alteration by ib r 85
[illegible]

53. The value of Government securities of the descriptions mentioned in the last preceding Rule shall, for the purposes of the said Act and of these Rules, or of an Order when equivalent amounts are to be dealt with, be ascertained according to the average price of the securities appearing in the account transmitted to the Comptroller General of the said Commissioners by the cashiers of the Bank, a copy whereof shall be sent daily by the Bank to the Chancery Pay Office.

List of unclaimed funds to be triennially made and exhibited.

54. As soon as conveniently may be after the first of October, 1873, and after the same day in every succeeding third year, a list shall be prepared by the Paymaster General, and filed in the

Report Office, and a copy thereof shall be inserted in the *London Gazette*, and exhibited in the several offices of the Court, of the titles of the causes and matters in the books at the Chancery Pay Office (other than the causes or matters referred to in the next following rule), whereon money, or securities, may be standing and which causes and matters have not been dealt with by the Accountant General or by the Paymaster General (otherwise than by the continuous investment or placing on deposit of dividends), during the fifteen years immediately preceding such first of October, and no information shall be given by the Paymaster General respecting the funds standing to the credit of a cause or matter contained in any such list until he has been furnished with a statement in writing by a solicitor requiring such information, of the name of the person on whose behalf he applies, and that, in such solicitor's opinion, the applicant is beneficially interested in such funds.

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Revoked by Chan Funds Consold Rules 1874 r1 but republished with alterations by ch r 91

[illegible]

Transfer of small balances to National Debt Commissioners.

55. As soon as conveniently may be after the first of October, 1873, and the same day in each succeeding year, the Paymaster-General shall carry over, to an account in the books at the Chancery Pay Office, entitled "Account of Suitors' Balances under £5," the money and securities standing in such books to the credit of the causes or matters where the money and securities shall not together amount to £5, and on which the money or securities shall not have been dealt with during the preceding twelve calendar months.

Revoke by Chan Funds Consolde Rules 1872 r1 but republished by ch r 92

[illegible]

The Bank, upon an Order of the Lord Chancellor, and without a cheque of the Paymaster General as to money, but on a certificate of a Registrar of the Court, countersigned by the Paymaster General, as to Government securities, shall transfer to the account of the Commissioners for the Reduction of the National Debt such amounts of money and Government securities as may appear by a certificate of the Paymaster General (a duplicate whereof shall be filed) to have been so carried over, and the said Commissioners shall apply all money transferred to them in pursuance of this Rule in the same manner as if such money were a surplus of annual revenue, but such carrying over and application shall be without prejudice to the right of any person to whom such money or securities may be ordered to be paid or transferred, to apply to the

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Treasury for, and to obtain payment or transfer thereof, together with any dividends that shall have accrued on such securities.

Certain accounts excepted therefrom.

Revoked by Chan Funds Consold Rules 1874 r 1

56. The provisions of the last preceding Rule are not to extend to the causes or matters to the credit of which there is money for which a cheque has been signed by the Accountant General, or may have been signed by the Paymaster General, although such cheque may not have been delivered out.

Statutory declarations substituted for affidavits.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r 96

57. When evidence is required by the Paymaster General for carrying into effect a direction in an Order, or otherwise, statutory declarations under the Act of fifth and sixth *William* the Fourth, chapter sixty-two, may, unless the Order shall otherwise direct, be received and acted on instead of affidavits, and such statutory declarations shall be filed in the Report Office when the Paymaster General shall consider it necessary.

Solicitors to insert their names and addresses on documents left in the Paymaster General's Office.

Revoked by CFCR 1874 r 1 but republished with alterations by ib r. 93

58. Every Order or request that may be left at the Chancery Pay Office, and every statutory declaration or other document required to be retained there for the purpose of carrying into effect an order, shall have legibly written thereon the name and address of a solicitor.

Title of accounts not to exceed limited number of words.

Revoked by Chan Funds Consold Rules 1874 r 1 but republished with alterations by ib r. 94

59. The length of the title of any account hereafter directed or requested to be raised in the books at the Chancery Pay Office is not to exceed thirty-six words, exclusive of the reference to the Record, as defined in Rule 2, and four figures in such title are to be reckoned as one word; but this Rule shall not apply to any account which has been directed to be raised by an Order made before the commencement of these Rules.

Documents to be filed at Report Office.

Revoked by Chan Funds Consold Rules 1874 r. 1 but republished by ib r. 95

60. All documents by these Rules directed to be filed shall be filed in the Report Office of the Court, and an index thereof shall be made and kept there.

Selborne, C.

We certify that these Rules are made with the concurrence of the Commissioners of Her Majesty's Treasury.

R. Lowe.

W. H. Gladstone.

CHANCERY FUNDS ORDERS, 1872.

1872

ORDERS OF COURT,

UNDER

THE COURT OF CHANCERY (FUNDS) ACT, 1872,

35 & 36 VICT. c. 44.

The 23rd day of December, 1872.

Revoked by Chan Funds Amended Orders 1874
W.N. (75) [illegible] 20, 21

The Right Honourable Roundell Baron Selborne, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable John Lord Romilly, Master of the Rolls, the Right Honourable the Lord Justice Sir William Milbourne James, the Right Honourable the Lord Justice Sir George Mellish, the Honourable the Vice-Chancellor Sir Richard Malins, the Honourable the Vice-Chancellor Sir James Bacon, and the Honourable the Vice-Chancellor Sir John Wickens, doth hereby, in pursuance of the powers contained in "The Court of Chancery (Funds) Act, 1872," and of all other powers and authorities enabling him in that behalf, Order and direct in manner following:—

1. These Orders shall come into operation on the 7th day of January, 1873; and may be cited as the "Chancery Funds Orders, 1872."

Commencement of Orders.

Revoked by C.F.a Ords 1874 ord 1
W.N. (75) [illegible], 20

2. In these Orders, and in Orders as herein defined terms shall have the same meaning as the same terms in the Court of Chancery (Funds) Act, 1872, and as prescribed by the Chancery Funds Rules, 1872, and the term "Court" shall mean the Court of Chancery, and include a Judge thereof, whether sitting in Court

Interpretation of terms.

Revoked by Chan Funds Amdd Ords 1874 Ord 1 but reenacted with alterations by ib. ord 2.
W.N. (75) [illegible]

1872

See last page

or at Chambers; and the term "Order" shall mean an Order of the Court of Chancery hereafter to be made, and shall include a decree; and the term "cause or matter" shall, in these Orders, include a separate account in a cause or matter, and a matter intituled merely as an account; and words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number; and words importing the masculine gender shall include females.

Abrogation of certain Orders in Chancery.

Revoked by CFA Ord 1874 Ord 1 but republished with additions by the Ord 3. WM75 Oct 20.21

3. Rules 14, 15, and 16, of the first of the Consolidated Orders of the Court, and Rule 5 of the fifth of the same Orders, are hereby abrogated.

Notice of payment, transfer, or deposit on request.

Revoked by Chan Funds Amdt Ords 1874 Ord 1, but republished with alteration by the Ord 4 WM75/10/Oct. 20.21

4. The person making a transfer, payment, or deposit upon request to the credit of a cause or matter, as provided by the 10th of the Chancery Funds Rules, 1872, shall forthwith give notice thereof to the solicitors on the record for the parties to the cause, or, in case of a matter, to the persons interested, if known, or to their solicitors, if any, stating in such notice what the money or securities comprised in such transfer, payment, or deposit represent, and for what purpose such transfer, payment, or deposit has been made; and such notice may be sent by post.

Restriction on issuing certificates during vacations.

Revoked by CFA Ord 1874 Ord 1 but republished by the Ord 12 WM75/10/Oct. 20.21

5. The Registrars of the Court shall not, without a special direction of a Judge, be required to issue certificates for the sale, transfer, or delivery of securities in Court during any vacation in their office.

Applications at Chambers.

Revoked by Chan Funds Amdt Ord 1874 Ord 1 but republished with alteration by the Ord 13 WM75/10/Oct. 20.21

6. Applications under the Court of Chancery (Funds) Act, 1872, for the conversion into cash of Government securities in Court of any of the three descriptions mentioned in the 28th of the Chancery Funds Rules, 1872, and for placing cash on deposit, or for dealing with interest on money on deposit, may be made to the Master of the Rolls and the Vice-Chancellors respectively, while sitting at Chambers.

Petitions respecting money or securities on list of undealt-with funds.

7. When a cause or matter has been inserted in the list mentioned in Rule 54 of the Chancery Funds Rules, 1872, the fact shall be stated in any petition to the Court affecting money or securities on the credit of such cause or matter.

Revoked by Chan Funds Amdt Ords 1874 Ord 1
but republished with alteration by the Ord 14
[illegible]

8. Applications under the Copyhold Acts respecting any securities or money in Court, shall be made by summons at the Chambers either of the Master of the Rolls or of one of the Vice-Chancellors; but notice of any such application is not to be given to the Copyhold Commissioners, except when the Judge may so direct; and this Order shall be deemed an additional article to the 35th of the Consolidated Orders, Rule 1.

Applications under Copyhold Acts to be made at Chambers.

Revoked by C F A Ords 1874 Ord 1, but republished with alteration by ib Ord 15 W.R. 1874 [illegible]

9. The Clerks of Records and Writs shall not receive into their custody effects of the suitors consisting of jewels or plate, or other articles of a like nature, or negotiable securities.

Certain articles and securities not to be received by Clerks of Records and Writs.

Revk by C F A Ords 1874. 1. but republd by ib 16 W.R. 75 [illegible]

10. No Order in a cause shall be passed or entered, and no certificate in a cause of a Chief Clerk of a Judge of the Court, or of a Taxing Master of the Court, shall be signed or filed, and no petition in a cause shall be answered, and no summons in a cause shall be issued, and no affidavit made in a cause shall be filed, until the same respectively be either marked with the reference to the record, as prescribed by the 1st of the Consolidated Orders, Rule 48, or be inscribed with a note indicating that the cause was commenced prior to 2nd November, 1852, and the correctness of such reference may be required to be authenticated by the official seal of the Clerks of Records and Writs being impressed on every such document.

Proceedings and documents in a cause to be marked with reference to record.

Revoked by Chan Funds Amdd Ords 1874 Ord 1 but republished by ib 17 [illegible]

11. Solicitors shall be entitled to charge and be allowed the same fees on proceedings under these Orders, and under the Chancery Funds Rules, 1872, as they are, by the Orders and practice of the Court, entitled to charge and be allowed in respect to proceedings of a similar or analogous description.

Solicitors' fees.

Revoked by Chan Funds Amdd Ords 1874 Ord 1 but republished with alteration by ib Ord 19 W.R. 1874 [illegible]

SELBORNE, C.
ROMILLY, M.R.
WILLIAM MILBOURNE JAMES, L.J.
GEORGE MELLISH, L.J.
RICHARD MALINS, V.C.
JAMES BACON, V.C.
JOHN WICKENS, V.C.

1872

GENERAL ORDERS IN LUNACY,

UNDER

THE COURT OF CHANCERY (FUNDS) ACT, 1872,

THE LUNACY REGULATION ACT, 1853,

AND THE LUNACY REGULATION ACT, 1862.

Revoked by Chan Funds And Lunacy Acts 1874

The 23rd day of December, 1872.

I, The Right Honourable Roundell Baron Selborne, Lord High Chancellor of Great Britain, intrusted by virtue of Her Majesty the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, do, with the advice and assistance of the Right Honourable the Lord Justice Sir William Milbourne James, and the Right Honourable the Lord Justice Sir George Mellish, the Lords Justices of the Court of Appeal in Chancery, being also intrusted as aforesaid, and by virtue and in exercise of the powers or authorities in this behalf vested in me by the Lunacy Regulation Acts, 1853 and 1862, and the Court of Chancery (Funds) Act, 1872, and of every other power or authority in anywise enabling me in this behalf, Order as follows:—

Revoked by C F A L Ord 1874 Ord 1, & a former substituted

1. These Orders shall come into operation on the 7th day of January, 1873, and they may be cited as the "Chancery Funds Lunacy Orders, 1872."

Revoked by C F A L Ord 1874 Ord 1, but reprinted with ~~alterations~~ ly as Ord 2.

2. Terms, words, and expressions in these Orders shall be read and construed according to the interpretation thereof contained in the 2nd section of the Lunacy Regulation Act, 1853, and the Court of Chancery (Funds) Act, 1872, and the 3rd provision of the General Orders of the 7th November, 1853; and the

1872

word "Court" shall mean the Court of Chancery; and the word "Order" shall include a report of a Master in Lunacy confirmed by fiat.

3. The 49th, 50th, and 51st of the General Orders in Lunacy of 7th November, 1853, shall be, and they are hereby abrogated.

Revoked by CFaL Ords 1874 Ord 1 but republished with additions by the Ord 3.
[illegible]

4. An Order or certificate of the Masters containing directions for payment into or deposit in the Bank of England, with the privity of the Accountant General of the Court of Chancery, to the credit of the matter of a lunatic, of money, securities, or other effects, or for the transfer into the name and with the privity of the Accountant General in trust in the matter of a lunatic of stock or securities, and specifying the account, if any, to which the money, stock, securities, or other effects is or are to be placed, and which directions shall not at the coming into operation of these Orders have been acted upon, shall be read and construed as if they directed such money, stock, securities, and other effects respectively to be paid and transferred into, and deposited in, Court to the credit of the matter of such lunatic and account, if any, respectively.

Revoked by CFaL Ords 1874 Ord 1 but republished by the Ord 4
[illegible]

5. After the coming into operation of these orders, an order and any certificate of the Masters for the purpose of a payment or transfer into or deposit in Court of money, stock, securities, or other effects shall direct such payment or transfer to be made into, and deposit to be made in Court, to the credit of the matter of the lunatic, to the account, if any, to which it is intended that such money, stock, securities, or other effects should be placed.

Revoked by CFaL Ords 1874 Ord 1, but republished ~~[illegible]~~ alteration by the Ord 5.
[illegible]

6. After the coming into operation of these Orders no declaration of trust with respect to stock or securities transferred into Court to the credit of the matter of a lunatic shall be required to be made.

Revoked by CFaL Ords 1874. Ord 1. but republished with alterations by the Ord 6
[illegible]

SELBORNE, C.
W. M. JAMES, L.J.
GEORGE MELLISH, L.J.

NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Chancery Appeal Cases

(*Including Bankruptcy and Lunacy Cases*)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

FARQUHAR *v.* HADDEN.

L.JJ.
1871
Nov. 4.

[1869 F. 30.]

Will—Specific Legacy—Bequest of Share in a specific part of Partnership Property—Exoneration.

F. and *L.* were partners entitled in equal shares. Part of the assets consisted of leasehold premises vested in them as joint tenants, in which the business was carried on. *F.*, by his will, bequeathed to *L.* "all my share of the leasehold premises in which my business is carried on." After *F.*'s death the assets of the partnership proved insufficient to pay the partnership debts, though *L.* and the estate of *F.* were amply solvent. *L.* bought the share of *F.* in the leasehold premises, without prejudice to his rights under the bequest; and a certificate having been made in a suit for the administration of *F.*'s estate, shewing that it was solvent, *L.* presented a petition to have it declared that the effect of the bequest was to give him a moiety of the leasehold, exonerated out of *F.*'s estate from the partnership debts, and for the return of the purchase-money which he had paid:—

Held (reversing the decision of *Stuart*, V.C.), that the bequest only gave such interest in the leasehold as *F.* had, namely, a right to a moiety subject to payment of the partnership debts; and that as the partnership debts exhausted the assets the bequest failed.

THIS was an appeal by the children of the testator, *T. N. Farquhar,* from an order made by Vice-Chancellor *Stuart* on the petition of *Joseph Leech.*

Previously to, and up to, the death of the testator, he and

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Leech carried on business as solicitors in partnership. They were entitled in equal shares. Part of their partnership assets consisted of certain leasehold offices in *Moorgate Street*, the legal estate in which was vested in them as joint tenants.

Farquhar made his will, dated the 6th of October, 1863, containing the following bequest: "I bequeath all my share of the leasehold premises in *Moorgate Street* and in *Old Palace Yard*, or elsewhere, in which my business is carried on, and all my share of the office furniture, books, and other office or household effects therein respectively, to my partner, *Joseph Leech*, in case he shall be living at my decease, for his own absolute use and benefit." He gave pecuniary legacies to his children, and bequeathed his residuary estate among them.

The testator died in July, 1866. The lease of the premises in *Old Palace Yard* expired shortly after his decease, and no question arose as to them. A question, however, arose soon after his death as to the operation of the bequest of the testator's share in the *Moorgate Street* premises, and it was arranged that *Leech* should purchase a moiety of those premises for £4000, and a moiety of the books, furniture, &c., for £400, without predjudice to any question as to his rights under the bequest; and a moiety of the leasehold premises likewise was accordingly assigned to him upon his paying £4400 to an account which had been opened at a bank for the purpose of receiving the assets of the firm.

Owing to depreciation in the leasehold property of the partnership, it turned out that the assets of the firm were insufficient to satisfy its debts, though both *Farquhar's* estate and the surviving partner were amply solvent after paying whatever might be required to make up the deficiency.

This suit having been instituted for the administration of *Farquhar's* estate, and a certificate having been made stating that no creditor had proved, *Leech* presented a petition stating to the above effect, except that it did not shew that he and the testator were at law joint tenants of the leasehold, and praying that it might be declared that the bequest was a bequest of an undivided moiety of the leasehold premises and other particulars comprised in the bequest, without regard to the state of the partnership assets and liabilities, and that in settling accounts between the testator's estate and the petitioner he was entitled to have credit given him for the £4400.

Vice-Chancellor *Stuart* made an order containing a declaration to the effect prayed, and ordering the costs of the petitioner to be paid out of *Farquhar's* estate (1).

(1) 1871. February 24.

SIR JOHN STUART, V.C.:—

This question seems to me to be reasonably clear, if it is considered that it is a question that arises in the administration of the estate of one partner who has chosen to make his surviving partner an object of his bounty. Mr. *Farquhar*, by his will, in clear and distinct terms, has specifically given to Mr. *Leech* all his share of the leasehold premises in *Moorgate Street*, in which the business was carried on. Here the specific matter of the bequest is very clearly and distinctly stated. The testator and Mr. *Leech* were tenants in common of this leasehold property, each entitled to an undivided moiety; and in language as distinct, I think, as any language could well be, that undivided moiety of the leasehold property which he had he has given to his partner.

But it is said in the administration of the estate of the testator, not in the administration of the affairs of the partnership, there is an equity as between the several legatees of the testator and this specific legatee, and that I am to consider that what the testator gave is not what he has described, but that what he gave was only such interest in that leasehold property as he might have after the affairs of the partnership were wound up. Now, if the testator had said so, of course this specific legatee could get no more than that. But there is nothing in the will to shew anything of the kind. The claim is a claim by the pecuniary and residuary legatees of the testator to get part of what was specifically given to another object of the testator's bounty, which is ridiculous, because a specific legatee is entitled to the specific legacy, unless the estate is insolvent. In this administration suit it appears from the Chief Clerk's certificate that there is no insolvency, yet, in administering his estate, I am called on to say, in the case of a testator as to whose estate no creditor has come in to make any claim, that the specific legatee shall be disappointed.

As to the rights of the creditors of the partnership, that is entirely another thing, because each party is liable to the whole extent of his assets to make good the partnership debts; and it can make no difference that the whole of this as well as the whole of Mr. *Leech's* property is applicable to satisfy the partnership debts.

I had some doubt whether the Court could regularly interfere upon this petition of a specific legatee and make such a declaration or give such a direction as is sought; but on looking at the form of the decree, I see that the decree is distinctly that the whole real and personal estate of the testator should be administered; and in that state of things, although the accounts taken are only accounts of the property not specifically bequeathed, there being no doubt of the existence of this specific property, and what the nature of the property was, and the extent of the testator's interest in it, I think the case is one in which there is no formal difficulty in making the declaration, though not exactly in the form in which

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Sir *Roundell Palmer*, Q.C., Mr. *Greene*, Q.C., and Mr. *T. Stevens*, for the Appellants:—

The bequest passes only such interest as the testator had after payment of the partnership debts: *West* v. *Skip* (1); *Taylor* v. *Fields* (2); *Barker* v. *Goodair* (3); *Dutton* v. *Morrison* (4); *Darby* v. *Darby* (5). The partnership being insolvent, this interest was nothing, and the gift fails.

Mr. *Dickinson*, Q.C., and Mr. *Daniel Jones*, for the Respondent:—

We do not dispute that a partner's interest in a partnership chattel is only a share of what remains of it when the partnership debts have been paid; but no case goes to this, that a partner may not, as between his own legatees, treat a certain partnership chattel as exempted from payment of debts. Effect ought, if possible, to be given to the words of a will, and it may be given to this bequest by exonerating the specifically bequeathed chattel out of the testator's other property, the case being really very much the same as that of a specific bequest of an incumbered chattel, which must be exonerated out of the general estate. If the testator had assigned to *Leech* by deed, it is clear that *Leech* would have been entitled on the footing we contend for, and less effect cannot be given to the bequest.

SIR W. M. JAMES, L.J.:—

With deference to the Vice-Chancellor, I am bound to say that I entertain no doubt whatever as to the proper construction to be

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it is asked. What I propose to do is to make an order, saying, "It appearing by the certificate of the Chief Clerk that no person has come in under the decree and claimed any debt out of the estate of the testator, declare that the petitioner, as specific legatee thereof, under the will of the testator, is entitled to all the share of the testator of and in the leasehold premises in *Moorgate Street*, and also to the testator's share of the office furniture, &c., and is, as between himself and the estate of the testator, so entitled, free from any liability in respect of the obligations or liabilities of the partnership; and that, in adjusting the accounts of the partnership between the Plaintiffs the executors of the testator, and the Petitioner, the Petitioner is entitled to have credit for the sum of £4400, being the amount produced by the sale in the petition mentioned of the property comprised in the specific bequest."

(1) 1 Ves. Sen. 239.

(2) 4 Ves. 396.

(3) 11 Ves. 78, 85.

(4) 17 Ves. 193.

(5) 3 Drew. 495. 2 Jur NS 271

put upon this instrument. The question is, what is the natural, grammatical, and ordinary meaning of the words of the bequest to the testator's partner. It is admitted that if those words had been used in a bequest to anybody else it would only have given the interest which the testator had in this property at his death, namely, a right to a moiety, subject to the application of the assets of the partnership in payment of the partnership debts. What is contended by the Respondent is, in fact, that the bequest was not merely a gift of the interest of the testator in the property, but a gift of that interest, with an additional gift of so much of his residuary personal estate as should be required to free this property from its ordinary liability to pay the partnership debts. I cannot find anything of that kind in the will, and even were I at liberty to guess at the intention of the testator, I should not arrive at a conclusion favourable to Mr. *Leech's* claim. We are asked to attribute to the testator an intention that, in case the partnership assets should turn out to be insufficient for the payment of the partnership debts, then the partner was to have a right to call on the testator's estate to contribute more than its ordinary share towards payment of them, in order to give effect to this bequest. If I were to guess at the testator's intention, that would be the last thing that I should guess him to have intended. If the gift had been, as the Vice-Chancellor seems to have treated it as being, a gift of "my moiety," and the testator and his partner had been tenants in common at law, so that the testator would have had at his death a legal and equitable estate, which would pass to his executors, it might require some further consideration as to whether the gift would not then have been a gift of a moiety free from partnership debts, and whether Mr. *Locke King's Act* would apply to take away the right to exoneration. But we have not to deal with that case; we have to deal with a case in which the partners were joint tenants at law, and in which the testator's only transmissible interest in the property was the equitable interest of a partner in a part of the partnership assets; and we have to give effect to the words "all my share of the leasehold premises." Mr. *Leech* at law became liable for all the debts of the partnership, and he had a right to have all the assets of the partnership applied in payment of such debts; and the thing answering to the description of "all my share" is such interest in the leasehold as the executors could have claimed from Mr. *Leech* if there had been no bequest to him. There is nothing to give him a right to call on the testator's estate to pay more than its share of the partnership debts, in order to increase the value of this bequest. I am, therefore, of opinion that, as the assets of the partnership have been absorbed in payment of partnership debts, the bequest failed, and that the Vice-Chancellor's order is erroneous, and ought to be reversed.

Sir G. Mellish, L.J.:—

I am of the same opinion. Let us first consider what is the plain, natural, and grammatical meaning of the words which the testator has used. The testator had no interest in this house at all, except his interest as partner with Mr. *Leech*; they were joint tenants of the lease, and his interest simply consisted of an interest which the estate of a deceased partner has in equity in the assets of the partnership, that is to say, an interest subject to the payment of the debts of the firm. That being his interest, he bequeaths "all my share of the leasehold premises, and of the office furniture and books, &c.," to his partner. It is said that that is an inaccurate description. I do not see that there is in it any substantial inaccuracy. He had an interest in the property, subject to the payment of the debts—such an interest as a creditor of his might have taken in execution; that was the interest which he had, and that is what he leaves to his partner. That, however, may not be conclusive if we find in the surrounding circumstances and facts of the case, which we are entitled to take into consideration, and in the language of the rest of the will, anything which shews us that he really did intend, in all events, whether the partnership was solvent or not, that Mr. *Leech* should have a moiety of this property. But in order to justify a departure from the grammatical construction, one must be convinced that the testator contemplated the events that have happened, and that he intended, in the events that have happened, that Mr. *Leech* should take. I am convinced that he did not contemplate these events at all, but thought that the partnership was perfectly solvent, and intended, on that assumption, that his partner should continue to be in the personal enjoyment of the partnership property for the purpose of carrying on the business. It is plain to my mind that

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the real object of the testator in the gift was that he thought the enjoyment of this property would be more advantageous to his partner than to anybody else, and he therefore gave it him that he might continue in that personal enjoyment. That shews plainly that he never thought the partnership was insolvent, so that this property would be required for the payment of partnership debts. Therefore I am clearly of opinion that he never contemplated the event of the partnership being insolvent, and had no intention to make any provisions for giving effect to this bequest in the event of such insolvency. The order of the Vice-Chancellor must be discharged, and Mr. *Leech*'s petition dismissed with costs.

Solicitors: Messrs. *Lyne & Holman*; Mr. *Leech*.

Principle applied. Re HICKMAN'S WILL TRUSTS. [1948] 2 All E.R. 303.

Applied. In re HICKMAN. [1948] Ch. 624

RADFORD *v.* WILLIS.

[1871 R. 58.]

L. JJ.
1871
Nov. 11.

15 Eq. 184, 14
13 Ch D. 778

Will—Construction—Gift to Husband of Unmarried Daughter—Word "Unmarried"—Vesting—Doubtful Title—Specific Performance.

A testator gave his estates to trustees upon trust to pay the rents to his two daughters (both then unmarried) in equal shares during their respective lives, "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry;" and after their respective decease, upon trust to convey the estates "unto and equally between the respective husbands of them, my said daughters, to hold to them respectively, and their respective heirs and assigns;" with a proviso, that if either of his daughters should "depart this life unmarried," her share should go to the survivor for her life, and on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—

Held (reversing the decision of *Wickens*, V.C.), that the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasibly vested remainder in fee to her first husband. And that, as the question turned on a general rule of construction, unaffected by any special context in the will, the title would be forced on a purchaser.

THIS was an appeal by the Plaintiffs from an order of Vice-Chancellor *Wickens* allowing a demurrer.

L. JJ.
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v.
WILLIS.

Thomas Draper devised and bequeathed his real and personal estate to trustees, in trust to pay the income to his daughters *Ann* and *Lucy* in equal shares, during their respective lives, "independently of the control of any husband or husbands with whom they or either of them may happen to intermarry;" and after their respective decease, the trustees were to stand possessed of the property "upon trust to convey and assure, assign, pay, and transfer the whole thereof unto and equally between the respective husbands of them, my said daughters, to hold to them respectively, and their respective heirs, executors, administrators, and assigns, according to the several natures and qualities thereof respectively. Provided always, that if either of my said daughters shall happen to depart this life unmarried, then and in such case the share of such daughter in and to my aforesaid trust estate and premises, stocks, and funds, and securities, shall accrue and belong to the survivor of them, my said daughters, and be taken and enjoyed by her for her life in like manner as is before directed with respect to her original share; and on her decease the whole shall devolve to, and shall be conveyed, assured, assigned, and transferred to the husband of my said surviving daughter, as is hereinbefore directed with regard to her said original share."

At the time when the will, which was dated in January, 1831, was made, both the testator's daughters were spinsters. *Ann* married *William Radford* in March, 1831. The testator died in March, 1832; and in September, 1832, *Lucy Draper* married *Daniel Pearce.*

Ann Radford died in February, 1868, leaving her husband surviving her. *Daniel Pearce* died in March, 1868, having, by his will, devised his share in *Thomas Draper's* property to his wife, *Lucy Pearce,* absolutely. *Lucy Pearce* and the trustees of the will of *William Radford* contracted to sell part of *Thomas Draper's* real estate to the Defendant, who took the objection that *Lucy Pearce* had not a good title to a moiety, for that, if she married again and left a husband surviving her, such husband would become entitled to her share, or to a moiety of it. In order to have the question decided, a bill was filed by the vendors for specific performance, shewing the nature of the title; to which bill the Defendant demurred. Vice-Chancellor *Wickens* allowed the demurrer (1).

(1) Law Rep. 12 Eq. 105.

Mr. *Greene*, Q.C., and Mr. *H. J. M. Williams*, for the Appellants:—

The devise gives an indefeasibly vested estate in the first person answering the character of husband: *Jarman* on Wills (1); *Driver* v. *Frank* (2); *Stanley* v. *Stanley* (3); *Boreham* v. *Bignall* (4); *Stert* v. *Platel* (5). "Unmarried" means here "never having been married": *In re Sanders' Trust* (6); *Heywood* v. *Heywood* (7). A direction to convey to a person at a future time, when the conveyance is postponed merely on account of the existence of prior interests, does not constitute a contingent gift; nor is it necessary that the person to be benefited should be living at the time when the conveyance is to be made: *Adams* v. *Bush* (8); *Carlton* v. *Thompson* (9); *Re Mottram* (10); *Parker* v. *Sowerby* (11); *Smith* v. *Palmer* (12). The case of *Peppin* v. *Bickford* (13) is distinguishable. The Court will not hold the title doubtful, though the Judge below was against it: *Beioley* v. *Carter* (14); *Alexander* v. *Mills* (15).

Mr. *Shebbeare*, for the Defendant:—

As regards the point of construction, *Peppin* v. *Bickford* is undistinguishable from the present; and the natural construction of the words points to a husband who survives the wife, for to no other could a conveyance be made. The language of the separate use clause shews that the testator had second husbands in his contemplation. The construction for which the Plaintiffs contend makes the scheme of the will most unreasonable. Suppose the first husband were to die early, without children, the widow would be restricted to a life interest, after which the property would go away to strangers. *Longworth* v. *Bellamy* (16) is a strong authority in favour of an after-taken husband. At all events, the title is too doubtful to be forced on a purchaser, depending, as it does, on the construction of a very inartificially-framed will.

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(1) Vol. I. 3rd Ed. 304.
(2) 3 M. & S. 25; 8 Taunt. 468.
(3) 16 Ves. 491.
(4) 8 Hare, 131.
(5) 5 Bing. N. C. 434.
(6) Law Rep. 1 Eq. 675. 12 Jur NS 351,
(7) 29 Beav. 9. 7 Jur NS. 228
(8) 6 Bing. N. C. 164.
(9) Law Rep. 1 H. L., Sc. 232.
(10) 10 Jur. (N.S.) 915.
(11) 1 Drew. 488. 17 Jur 752
(12) 7 Hare, 225.
(13) 3 Ves. 570.
(14) Law Rep. 4 Ch. 230.
(15) Law Rep. 6 Ch. 124.
(16) 40 L. J. (Ch.) 513

SIR W. M. JAMES, L.J.:—

I am unable to agree with the Vice-Chancellor in this case. I have no hesitation in saying that, in the absence of a controlling context, a gift to an unmarried woman for life, with remainder to her husband in fee, vests an indefeasible estate of inheritance in the person who first answers the description of her husband. The case is one in which the broad general principle that the Court favours vesting more than contingency seems to me to be eminently applicable. A state of circumstances has been urged in argument in which, no doubt, the giving an indefeasible estate of inheritance to the first husband would produce an undesirable result; but a far more probable state of things—one much more likely to have been contemplated by the testator—is, that the first husband might die in the lifetime of the wife, leaving a family of children; and to suppose that the testator intended in such a case to give the property to the second husband, leaving the children wholly unprovided for, would be attributing to him so unreasonable an intention that we ought not to adopt a construction which would have that effect, unless we are obliged to do so. A gift to the lady for life, with remainder to her husband in fee, vests the property in the person who, according to the most natural and probable course of events, will be the father of her family, so as to enable her and him together during their lives, and him alone after her death, to make provision for the family. The case is, in my opinion, one where the rule in favour of early vesting ought to be applied more than in almost any other case.

Then is there any controlling context to raise a doubt as to the applicability of the general principle? In my opinion, none. In fact, the context, in my judgment, is strongly in favour of the construction to which the general rule would lead us; for I cannot bring my mind to doubt that by the word "unmarried" the testator meant "without having been married." If this view be adopted, we have a gift to the daughter for life, with alternative gifts, which exhaust the entire fee; if she marries it is given to her husband; if not, then upon the limitations of the other moiety.

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RADFORD
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WILLIS.

It is urged that the direction to convey makes it probable that the testator intended to point out a person to whom a conveyance could be made—a husband living at the time when the conveyance was to be executed. I am of opinion that there is nothing in this argument, the direction to convey being only in substance a direction to clothe the equitable interest with the legal estate. Then it is said that the gift to the separate use must mean that the wife was to enjoy the property free from the control of any husband; but that is not in the least inconsistent with a gift in fee to the first husband. If the testator did contemplate that his daughter might marry a second husband, that does not alter the plain meaning of the words, which import a gift to the first husband.

My opinion, therefore, is decidedly in favour of the title, and the question being one depending on a broad general principle of construction not affected by any special context, I am of opinion that there is no such doubt in the case as to induce us to refrain from saying that the title is one which must be forced on the purchaser. As, however, the purchaser has concurred in taking the opinion of the Court in the least expensive way, I think that he ought to be excused from paying costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and for the same reasons.

Solicitors: Mr. *W. H. Bishop*; Mr. *W. Wyatt.*

L. JJ.
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Nov. 13.

COWLES *v.* GALE.

[1870 C. 279.]

*Specific Performance—Sale of Public-house—Transfer of Licence—*9 *Geo.* 4, *c.* 61, *ss.* 11, 14—*Time of the Essence of the Contract—Licence in the name of a Dead Man.*

2 ChD 346
0ChD.739

Upon the sale of a public-house as a going concern time is of the essence of the contract. Where, therefore, upon the day for the completion of the contract the vendors were not in a position to transfer the licence under the 9 Geo. 4, c. 61, s. 11, the purchaser was held entitled to repudiate the contract.

The executors of the late owner of a public-house renewed the licence in the name of the deceased owner:—

Held, that the licence was absolutely void, and that the executors could not make a good title to the public-house.

Decree of the Master of the Rolls reversed.

Day v. *Luhke* (1) followed.

THIS was an appeal from a decree of the Master of the Rolls.

The bill was filed by the executors of *George Ross* to enforce specific performance of a contract for sale of the *Durham Arms* public-house, at *Romford*.

George Ross, before his death, was the owner and occupier of the public-house, holding a licence to carry it on, which in the ordinary course would have been renewed at the general licensing day, on the 26th of August, 1870, and, if not renewed, would have expired on the 10th of October. He died on the 13th of July, 1870, having appointed the Plaintiffs and his wife (who was made a Defendant by amendment) his executors.

On the 26th of August, 1870, the son of *George Ross* attended for the purpose of getting the licence renewed, which was done in the name of the deceased owner, *George Ross*.

On the 12th of October the Plaintiffs put up the property for sale by auction, and it was bought by the Defendant *C. H. Gale*, the time for completion of the purchase being fixed by the conditions of sale for the 16th of November, 1870.

The abstract of title was duly delivered to the purchaser's

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(1) Law Rep. 5 Eq. 336.

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solicitor, who sent in the following requisition with respect to the licence: "In whose names are the licences now standing?" To this the Plaintiffs' solicitor replied: "In the name of the late *G. Ross.* They will be transferred by the executors in the usual way."

The purchaser was satisfied with this answer, and attended on the 16th of November, with his solicitor and broker, at the *Durham Arms,* for the purpose of completing the purchase. The licence had been inadvertently left in *London,* and while it was being sent for the purchaser's solicitor inquired whether the licence had been transferred into the names of the executors, and on being informed that this had not been done he refused to allow his client to complete the purchase, on the ground that the Plaintiffs were not in a position to transfer the licence to him.

After some further negotiation the Plaintiffs filed the present bill on the 17th of December, 1870.

On the 16th of December the executors obtained a protection order till the next transfer day, under the 14th section of the 9 Geo. 4, c. 61; and on the 3rd of February a transfer of the licence was made, on their application, to the testator's widow, *Ann Ross.*

The Defendant, in his answer, took the objection, for the first time, that the licence, having been granted to a dead man, was wholly void, and refused to complete the contract on that account.

The Master of the Rolls was of opinion that, although the course pursued by the executors in taking out the licence in the name of *G. Ross* after his death was erroneous, yet, if the licence had been endorsed by the executors to the Defendant, he would have obtained an unimpeachable title to the public-house, and would have run no risk in carrying on the business; and he accordingly granted the relief prayed (1). The Defendant appealed.

(1) 1871. June 4. W/N (1871) 124

Lord Romilly, M.R., after stating the facts of the case, continued:—

The contention of the Defendant's counsel is, that a licence given to a dead man is no licence at all, and that the renewal of the 26th of August, 1870, was a merely frivolous and inofficious act, having no operation at all; and consequently, as there was no licence then to be transferred, none could be transferred; and that, according to *Day* v. *Luhke* (Law Rep. 5 Eq. 336) and *Claydon* v. *Green* (Law Rep. 3 C. P. 511), such being the case, the Defendant was entitled to abandon the contract.

Mr. *Roxburgh*, Q.C., Mr. *Poland* (of the Common Law Bar), and Mr. *Marten*, for the Appellant:—

The renewal of the licence in the name of a dead man was not only irregular, but absolutely void; and the purchaser would have been

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The answer of the Plaintiffs is twofold. First, they say that, assuming that the executors acted improperly in not obtaining the protection order under sect. 14, this misconduct in no respect affected the vendee; that the licence, if duly indorsed by the executors, protected him, and the penalty would be confined to the executors; and that, according to the practice adopted in the cases before the *Romford* district magistrates, the licence indorsed by the executors would have been treated as a valid transfer of the licence by the magistrates, and renewed in the name of the vendee. Secondly, they contend that, even if this were not so, still the Defendant is not at liberty to take the objection, as, on the 21st of October, 1870, two days after the delivery and receipt of the abstracts of title of the public-house, the Defendant's solicitors sent in the requisitions, one of which was in these words: "In whose names are the licences now standing?" to which the Plaintiff sent the following answer in writing: "In the name of the late *G. Ross.* They will be transferred by the executors in the usual way." No objection was taken to this answer. The change day was appointed, and the meeting took place as if nothing more were required, although the Defendant knew, or must be taken to have known, that the 26th of August, 1870, then passed, was the day for renewing the licence. These acts constitute a waiver of the objection if it could otherwise be maintained.

But, upon a consideration of the whole matter, I think that the objection itself cannot be maintained. As to any technical, or rather nominal, objection that the licence could not be transferred because a license to a dead man is nothing, and therefore there was none to transfer, I disregard that in that form, because the document purporting to be a licence granted by the magistrates, even if invalid, rendered it impossible for any person to obtain a licence other than the legal personal representatives of the testator and their assigns; and upon reading the evidence of Mr. *Smith*, the deputy-clerk for the *Romford* district, I am of opinion that, under this document, if indorsed by the Plaintiffs as executors of the testator, the Defendant would have obtained an unimpeachable title to carry on the trade of the public-house. I am also further of opinion that, if the course so adopted was not the right one, and even assuming that it was improper and contrary to the Act of Parliament of Geo. 4, still that the Defendant ran no risk in accepting such transfer, as the penalty (if any) would have fallen on the executors of the testator, and not on the Defendant. It is to be observed that the cases of *Day* v. *Luhke* (Law Rep. 5 Eq. 336) and *Claydon* v. *Green* (Law Rep. 3 C. P. 511) are distinct from this. In *Day* v. *Luhke* a good title to the public-house could not be made except under the 14th section of the Act, and a mere transfer of the licence under sect. 11 was what the executors were able and willing to make. In *Claydon* v. *Green* it could not be done, because the licensee was alive, but had absconded, and could not be found to transfer the doing an illegal act if he had taken a transfer of it, and carried on business under it. The executors ought to have renewed the licence in their own names, and then they could have transferred it under the 11th section of the 9 Geo. 4, c. 61. It may be true that the magistrates would have granted a fresh licence to the purchaser on the ground that there had been a mistake, but the purchaser was not bound to submit to the delay and expense of such an application. In the case of the sale of a public-house time is of the essence of the contract. *Day* v. *Luhke* (1) is entirely in point. That case was approved of in *Claydon* v. *Green* (2). The Defendant never waived his objection; for at the time of replying to the requisition he did not know that the licence was taken in the name of a dead man. At the time of the meeting he objected that the vendors were not in a position to transfer the licence; and that objection proves to be well founded. He had therefore a right to repudiate the contract.

Mr. *Southgate*, Q.C., and Mr. *Horton Smith*, for the Plaintiffs:—

Assuming the Plaintiffs to have acted irregularly in taking the licence in the name of a dead man instead of to themselves, this irregularity in no way affected the purchaser. He would have been protected against all penalties by the indorsement of the licence by the executors to him. At all events, he had waived the objection, for the date of the death of *G. Ross* appeared in the abstract, and the purchaser was informed in the answer to the requisitions that the licence was held in his name.

Mr. *Daniel Jones*, for the widow of *G. Ross*.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decree of the Master of the Rolls in this case cannot be reconciled with his previous decision in *Day* v. *Luhke*. In the case of a sale of a public-house the purchaser buys it for the purpose of carrying it on, and it would be ruinous

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licence. But in case of death the executor has the power which in that case the licensee would have had if he had been present and indorsed over the licence.

I think, therefore, that the Plaintiffs are entitled to a decree for specific performance, and the Defendant must pay the costs up to and including the hearing.

(1) Law Rep. 5 Eq. 336.

(2) Law Rep. 3 C. P. 511.

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to him if he were kept out of it. I therefore agree with what the Master of the Rolls said in *Day* v. *Luhke* (1), that in the sale of a public-house as a going concern time is of the essence of the contract. In the present case the 16th of November, 1870, was fixed for the completion of the purchase, and the vendors were bound to shew that they were in a condition on that day to hand over to the purchaser a licence under which he could lawfully carry on the business of a publican. On that day, beyond all question, they had no such licence to hand over to him. The licence to a dead man was a mere nullity, and the purchaser was not bound to wait till the next session day of the magistrates to see if the vendors could get the matter set right, on the ground of mistake in granting the licence to a dead man, as probably they might have done under the 14th section of the 9 Geo. 4, c. 61, and then make a transfer to him under the 11th section. How long was the purchaser to wait in such a case? The vendors were not in a position to transfer the licence even when the bill was filed, nor had they intimated any intention at that time of getting the defect cured.

At first I thought that this case might have been distinguished from *Day* v. *Luhke*, by the fact that the time of the death of *G. Ross* was stated in the abstract of title, and consequently the purchaser had notice, from a comparison of the dates, that the licence was taken in the name of a dead man. But I think it would be mischievous to hold that the mention of the date would give notice of such a fact. Probably it did not occur either to the solicitor of the vendors or to the solicitor of the purchaser to put together the date of the death and the date of the renewal of the licence. I think, therefore, that there is not sufficient evidence of notice to induce the Court to hold that the purchaser had waived this objection. I am of opinion that the case is entirely governed by *Day* v. *Luhke*, and that the purchaser was justified in putting an end to the contract. The decision of the Master of the Rolls must be reversed, and the bill dismissed with costs.

Sir G. Mellish, L.J., concurred.

Solicitor for the Plaintiffs: Mr. *F. Mason*.

Solicitors for the Defendant: Messrs. *H. J. & T. Child*.

(1) Law Rep. 5 Eq. 336.

POOLE *v.* POOLE.

L. JJ.
1871
Nov. 21.

14 Eq 472
17 ChD 102
7 63-5

Will—Advancement—Statute of Limitations—Interest.

A testator, by his will, gave his property to his wife for life, and after her death equally between his children, subject to a proviso directing that his trustees should deduct from the share of his daughter *M. B.* the sum of £200 which he had advanced to her, and add it to his personal estate; and that if, at the period of distribution, *M. B.* "should be indebted to any or either of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share, and pay the same to the brother or sister to whom the same might be owing." *M. B.* had borrowed from one brother £100, on a promissory note bearing interest, and had borrowed other sums from another brother. Nearly all these debts had, before the time of distribution, become barred by the *Statute of Limitations*:—

Held, by the Vice-Chancellor of the Duchy Court of *Lancaster*, that the trustees were authorized to deduct from *M. B.*'s share all the debts, though barred by the statute, with the interest on such as carried interest:—

Held, on appeal, that the decree was right so far as regarded the principal of the debts, though barred by the statute; but that the intention of the testator was to put advances by brothers and sisters on the same footing as advances by himself, and that interest, therefore, ought not to be deducted.

THIS was an appeal by *Margaret Beck* from a decision of the Duchy Court of *Lancaster*.

Ralph Poole, the testator in the cause, by his will, dated the 6th of February, 1859, gave his real and residuary personal estate to trustees upon the usual trusts for conversion and investment, and upon trust to pay the income to his wife for life, and after her decease (subject to certain trusts declared as to a sum of £500, part thereof), he directed his trustees to stand possessed of three-sixths of the trust moneys upon trust to invest them as therein mentioned, and pay the income of one of such shares to each of his daughters, *Alice Hayes*, *Margaret Beck*, and *Ann G. Nicholls*, during her life for her separate use, and after the death of each to stand possessed of the capital of her share in trust for her children who should attain twenty one or marry; and if more than one, in equal shares. He then proceeded: "I nevertheless subject and make chargeable the share of my said daughter *Margaret Beck*, with the sum of £200 already advanced to her by me, and direct my trustees to deduct the same from the sum of money or share to which she would have been entitled under this my will, and add the same to the residue of my personal estate. And I further direct that if, at the period of the distribution and investment of the several shares of my said daughters as aforesaid, my said daughter *Margaret Beck* shall be indebted to any or either of her brothers or sisters in respect of advances made to her, that my said trustees shall be empowered to deduct all or any such debts or advances from her share as aforesaid, and to pay the same to the brother or sister to whom the same may be owing, whose receipts shall be discharges to my said trustees." He then proceeded to dispose of the three other sixth shares in favour of his sons or their issue.

The testator died on the 1st of July, 1860, and his wife on the 9th of May, 1868. On the 5th of August, 1870, a decree was made for the administration of his estate, at the suit of two infant children of his deceased son *John Poole*.

The Registrar, by his report, found that *Margaret Beck* became indebted to her brother *John Poole*, on a promissory note dated the 10th of May, 1852, for £100 and interest at £5 per cent. No part of the principal, nor any interest, had ever been paid. She also became indebted to her brother *Ralph*, in 1858 and 1859, in the sum of £47 16*s.* for money lent; and in 1863, in the sum of £44 17*s.* for money lent, making together £92 13*s.* No payment had ever been made in respect either of principal or interest.

By the order, on further consideration, it was declared that the power of deduction extended to any debts owing by *Margaret Beck* to any of her brothers or sisters, in respect of any advances made at any time before the death of the testator's widow to *Margaret Beck* while discovert, but not to any debts owing by her in respect of any other considerations; and that, in respect of any advances which might have been so made at interest, the power extended to authorize the deduction of the interest as well as the principal; and that the power might properly be exercised notwithstanding the death of any brother or sister who might have made any such advances; and notwithstanding that as respected any of such advances, or any interest upon interest-bearing advances, *Margaret Beck* would be able effectually to plead the *Statute of Limitations.*

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Mr. *Karslake*, Q.C., and Mr. *Lake*, for the Appellant:—

We rely on the legal sense of the word "indebted." The demands must be debts. Now, under a charge by will of a man's own debts, those barred by the *Statute of Limitations* are not payable: *Burke* v. *Jones* (1); and a trust to pay the debts of another person does not revive debts barred by the statute at his death: *O'Connor* v. *Haslam* (2). "Debts" mean debts which could be recovered.

[The Lord Justice James referred to *Courtnay* v. *Williams* (3).]

At all events, we ought not to be charged with interest: *Askew* v. *Thompson* (4).

Mr. *Finch*, *contrà*, was desired to confine himself to the question of interest, and contended that where a debt by the terms of the contract carried interest, the interest must stand on precisely the same footing as the principal, being a part of the debt.

Mr. *Marten*, for the trustees.

Sir W. M. James, L.J.:—

I think that we ought to vary the Vice-Chancellor's order with regard to the interest, but that in other respects it is right, and that the *Statute of Limitations* does not apply. The true meaning of the will appears to me to be, that advances made to *Margaret Beck* by her brothers and sisters were to be put on the same footing as if the testator himself had made them. He first refers to an advance made by himself, then to advances by the brothers and sisters, and directs them to be taken into account so as to make a fair distribution of his property between his children. The question whether the decision as to advances made during coverture is right, has not been argued, but I am disposed to think it right, for it is difficult to see how an advance during coverture, which would in effect be a payment to her husband, could be treated as an advance to *Margaret Beck* herself. I think the fair interpretation of the testator's words is, that he intended the advances to be allowed for as advances, not as debts; and that, therefore, only the

17 Ch D 7

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(1) 2 V. & B. 275.
(2) 5 H. L. C. 170.
(3) 3 Hare, 539; 15 L. J. (Ch.) 204.
(4) 4 K. & J. 620.

L. JJ.
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capital ought to be taken into account, and not any interest accrued before the estate became divisible.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors: Messrs. *Parkers, Pritchard, & Sharpe;* Messrs. *Hopwood & Sons;* Messrs. *Milne & Co.*

L. JJ.
1871
Nov. 8, 9.

Ex parte COHEN. *In re* SPARKE.

Injunction—Bill of Sale—Act of Bankruptcy—Bankruptcy Act, 1869, ss. 13, 72.

7 Ch 640
8 Ch 49.
— 147
9 Ch 274, -8
Q.B. 92, -6
CCR 111.
CP 672 -5-8
10 Eq 750
— 986, 7-
Ch.D. 53.
— 259
Ch D 682-3-4
Ch.D. 558
Ch.D. 186
[illegible] 96,
Ch.D. 543.

The Court of Bankruptcy has power to restrain a creditor from bringing against the trustee under a liquidation an action upon a bill of sale given by the debtor, the validity of which is disputed by the trustee.

An advance of £55 was made to a trader, on the security of bills of sale of all the goods and effects of the trader which were valued at £600. There was an agreement between the lender and the trader that the bills of sale should be from time to time renewed, so as to render it not necessary to register them. The bills were accordingly renewed every nineteen days, and this was done three times. The trader then became bankrupt:—

Held, that the last bills of sale were invalid, as constituting an act of bankruptcy.

Decision of *Bacon*, C.J., affirmed.

ON the 23rd and 24th of May, 1870, one *Barnett Cohen* advanced to *Samuel Sparke*, a coach-builder at *Liverpool*, two sums of £27 10*s*. each, on the security of two bills of sale, one of which comprised all *Sparke's* household goods and furniture, and the other all his stock-in-trade; the goods, furniture, and stock-in-trade, forming, in fact, the whole of his property. At the time when these bills of sale were given, a verbal agreement was entered into between *Cohen* and *Sparke* that the bills should, if *Sparke* desired it, be renewed from time to time within the period of twenty-one days, so as to avoid the necessity of registration under the *Bills of Sale Act*, and that *Sparke* should on each renewal pay the sum of £5 to *Cohen*, such sum to include all expenses. The bills were, in fact, so renewed, and fresh bills were given twice in June, and again on the 20th of July. On the 9th of

L. JJ.
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Ex parte COHEN.
In re SPARKE.

August *Sparke* presented a petition for liquidation by arrangement. The bills of the 20th of July were registered after the presentation of the petition for liquidation, and *Cohen* then brought an action for the goods against the trustee under the liquidation. The Judge of the County Court at *Liverpool* restrained the action, and afterwards refused to dissolve the injunction, and also decided that the bills were an act of bankruptcy, and void as against the trustee under the liquidation, on the ground that they amounted to an assignment of the whole of *Sparke's* property to secure a past debt. These decisions were afterwards affirmed by the Chief Judge, and *Cohen* now appealed. It was stated that the property included in the bills of sale exceeded £600 in value.

Mr. *De Gex*, Q.C., and Mr. *Bagley* for the Appellant:—

First, as to the injunction. This ought to be dissolved, and we ought to be left to try at law whether the bills of sale are valid. We have a good legal title, and though the Court of Bankruptcy may have jurisdiction given it under 32 & 33 Vict. c. 71, ss. 13, 66, 72, that jurisdiction is only co-ordinate, and the Courts of Common Law are not deprived of their jurisdiction. We do not proceed against the estate, but against the trustee. The Court of Bankruptcy can decide questions relating to the bankrupt's estate, but our case is, that this is not the bankrupt's estate at all. *Ex parte Anderson* (1) was a very special case.

The LORD JUSTICE JAMES:—I am clearly of opinion that this is just the case to which the Act is intended to apply. Here is a question whether these goods belong to the bankrupt's estate, and all such questions are now to be tried in the Court of Bankruptcy. The question must be determined in order to distribute the estate of the bankrupt; and instead of allowing whatever is left of the estate to be frittered away in litigation, the Legislature has determined that there should be one Court to decide all these questions. We should be very wrong if we were to decide this case so as to throw any doubt upon the subject.

The LORD JUSTICE MELLISH:—I am of the same opinion. For the purpose of getting a better distribution of the estate, the Court of Bankruptcy, and no other Court, is to decide questions relating to that estate. No other Court is to restrain proceedings in the Court of Bankruptcy, and the Court of Bankruptcy has power to restrain proceedings in any other Court. As to the remedy being against the trustee in person, and not against the goods, I think that is the very reason why the injunction should be maintained, for the question really is, to which of these two parties the goods of the bankrupt belong.

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(1) Law Rep. 5 Ch. 473.

Mr. *De Gex* and Mr. *Bagley* then proceeded to contend that the bills of sale did not constitute an act of bankruptcy, and were valid. They were given in pursuance of a prior agreement. There was no bargain that *Cohen* would not register, but they agreed that the bills should from time to time be renewed. *Cohen* might have enforced his security at any time, and merely gave the debtor time, thereby benefiting the creditors: *Bittlestone* v. *Cooke* (1); *Hollingsworth* v. *White* (2). There was a perfectly good conveyance of the goods, and a contingent agreement to renew it. That agreement could not make a good mortgage invalid. It was true that the advance was small in proportion to the value of the goods pledged, but when there was only a mortgage, and not a sale, that did not signify. They also cited *Harris.* v *Rickett* (3); *Hutton* v. *Cruttwell* (4); *Pennell* v. *Reynolds* (5).

Mr. *Reed*, and Mr. *Wheeler*, on the other side, were not called upon.

SIR W. M. JAMES, L.J.:—

In my opinion the decision of the County Court Judge, affirmed by the Chief Judge, is perfectly correct. It is an established principle in bankruptcy that an assignment of all the goods of a trader by way of security for a past debt is not a valid assignment. Here I find an assignment of all the goods and stock-in-trade of the debtor, which on the face of it purports to be made in consideration of two sums of £27 10*s*. each, advanced immediately before the execution of the deed. There was, in fact, not one farthing advanced on that day to the debtor. It appears to me that this was an act of bankruptcy, as it must necessarily have the effect of defeating and delaying the creditors. Then it was said that though the security was for a past debt, it could be supported by reason of a prior agreement made between the parties. But that agreement was evidently concocted for the purpose of evading, if possible, the remedy which the Act as to bills of sale intended to provide for the benefit of creditors. This attempt at fraud does not, in my opinion, strengthen the position of those who rely upon it to support the assignment. To hold that such an assignment could stand, would be a direct encouragement to fraud.

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(1) 6 E. & B. 296. 2 Jur N.S. 758
(2) 10 W. R. 619.
(3) 4 H. & N. 1.
(4) 1 E. & B. 15. 17 Jur 392
(5) 11 C. B. (N. S.) 709.

Sir G. Mellish, L.J. :—

I am of the same opinion. I think that this does not come within the cases cited, where a bill of sale is upon an advance agreed to be given, and is afterwards given, in which case it has been held to relate back to the time of the advance. In all those cases the agreement to give the bills of sale was binding on the debtor for the benefit of the creditor; but it is obvious that this debtor did not agree to give a fresh bill of sale for the benefit of the creditor. On the contrary, it is a device between them for the benefit of the debtor, to enable him to avoid that registration which the Act of Parliament has required. Such a consideration ought not to prevent the application of the ordinary rule that a conveyance of all a man's property for a past debt is an act of bankruptcy. On the contrary, it aggravates the case, as indicating actual fraud. The appeal must be dismissed with costs.

9 QB 21, 2
31,

Solicitors: Messrs. *Torr, Janeway, & Co.*; Messrs. *Chinery & Aldridge.*

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16 Eq 402-3
2 Ch D. 77-9
4 Ch D. 558
23 Ch D 71

Ex parte BOLLAND. *In re* CHERRY.

Fraudulent Preference—Bankruptcy Act, 1869, s. 92.

A payment by a bankrupt to a creditor, shortly before his bankruptcy, being impeached as a fraudulent preference, the case was tried before a jury, to whom the points submitted were: 1. Whether the bankrupt, when he made the payment was unable to pay his debts as they became due; 2. Whether he made it with a view to give that creditor a preference over his other creditors; and, 3, whether the payment was made by the bankrupt voluntarily and without real pressure, bankruptcy being reasonably imminent. The jury found in the affirmative on the first and third points, and in the negative on the second. On these findings the County Court Judge ordered the money paid to be refunded; but the Chief Judge reversed this decision:—

Held, on appeal, that the decision of the Chief Judge was right, for that the jury having found as a fact that the payment was not made with a view to giving the creditor a preference, and no proceedings being taken to set aside their verdict, this finding disposed of the whole case, and the finding on the third issue was immaterial, that issue being calculated to mislead the jury.

THIS was an appeal by the trustee of a bankrupt's estate from an order of the Chief Judge, who had reversed a decision of the County Court Judge at *Liverpool*, holding a payment to be a fraudulent preference.

The trustee in bankruptcy had applied for an order on Mr. *Matthews*, a creditor, to refund a sum of £1072 10*s*. which *Cherry*, shortly before becoming bankrupt, had paid to him in part payment of a debt of £3000, which payment was alleged by the trustee to be a fraudulent preference. The case was tried before the County Court Judge and a jury, the following issues being submitted to the jury:—

"Whether the bankrupt when he made the payment to Mr. *Matthews* was unable to pay his debts as they became due from his own moneys, and made it with a view to give that gentleman a preference over his other creditors.

"Whether the payment was made by the bankrupt voluntarily and without real pressure, bankruptcy being reasonably imminent."

The jury found that the bankrupt when he made the payment was unable to pay his debts as they became due from his own moneys—that he did not make it with a view to give *Matthews*

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a preference over his other creditors—and that the payment was voluntary and without real pressure, bankruptcy being reasonably imminent.

The Judge upon this finding made an order upon *Matthews* to refund the £1072 10*s*. This order was reversed by the Chief Judge, and from the order of reversal the trustee appealed.

Mr. *Herschell*, for the Appellant:—

The jury have negatived the intention to give a preference, but they have also found facts from which, according to *Hale* v. *Allnutt* (1), *Freeman* v. *Pope* (2), and *Ex parte Tempest* (3), the Court infers that intention. In this state of things the Court will either affirm the order of the County Court Judge, or direct a new trial.

[THEIR LORDSHIPS asked whether the Appellant wished to go into the facts of the case to shew that there ought to be a new trial; but he declined to do so.]

Mr. *De Gex*, Q.C., and Mr. *Charles Russell*, for *Matthews*, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion in this case that the decision of the Chief Judge is perfectly well founded. I have come to the conclusion that the proper question was left to the jury, namely, whether the debtor made the payment with a view of giving the creditor preference over the other creditors, and that their verdict upon that question determines the case. It is not suggested to us on the part of the Appellant that there was any miscarriage on the part of the Judge in directing the jury as to it, nor has he made any attempt at shewing that the verdict was against the evidence. If it were so, there should have been an application to set it aside. There is a verdict by the jury which we must take them to have come to upon evidence after a proper direction from the Judge, and it contains an express finding upon the very point which the Act of Parliament makes the test of fraudulent preference. The Appellant relies upon another finding of the jury in answer to a question

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(1) 25 L. J. (C.P.) 267, 2 Jur. N.S. 905

(2) Law Rep. 9 Eq. 206; Ibid. 5 Ch. 538.

(3) Law Rep. 6 Ch. 70.

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of the Judge ; but that second finding appears to me wholly immaterial. We cannot go behind the first finding, which has in no way been impeached, and the Appellant has shewn no disposition to have the facts gone into before us to see whether we should grant a new trial. The jury having found, as a fact, that the debtor did not make the payment with a view of giving to this creditor a preference over the other creditors, we are asked, not to grant a new trial, but to find that an intention existed which the jury, with all the evidence before them, and with proper directions from the Judge, have found not to exist. I am of opinion that the appeal must be dismissed.

SIR G. MELLISH, L.J. :—

I am of the same opinion. This case has been tried on certain issues before the Judge of the County Court. The first issue raises the whole question which has to be determined, viz., "Whether the bankrupt when he made the payment to Mr. *Matthews* was unable to pay his debts as they became due from his own moneys, and made it with a view to give that gentleman a preference over his other creditors." That is the sole definition of fraudulent preference given in the Act. The jury find as to the first part that the bankrupt was unable to pay his debts as they became due. Then they find as to the second part that he did not make this payment with a view of giving Mr. *Matthews* a preference. If the finding had stopped there nobody could have argued that it did not negative fraudulent preference. Then they go on to present a verdict on an issue which is wholly immaterial, "Whether the payment was made by the bankrupt voluntarily and without real pressure, bankruptcy being reasonably imminent." The answer is, "The payment was voluntary and without real pressure, bankruptcy being reasonably imminent." Whether there was anything that a jury would consider real pressure is not at all a test whether there was fraudulent preference. It is perfectly clear on the authorities, and we acted on that view in *Ex parte Tempest* (1), that if there has been such a demand as partly influenced the bankrupt in making the payment so that he did not

(1) Law Rep. 6 Ch. 70.

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make it entirely voluntarily, the payment is not a fraudulent preference. The words "voluntarily" and "without real pressure" make this question one which would tend to mislead the jury, and to induce them to believe that if there was not what they considered real pressure, although there was such a degree of demand as to prevent the payment being made with a view to give the creditor preference over the other creditors, then it was fraudulent preference. I think the finding on the first issue must be taken as decisive. If there were really any ground for raising this question, I think that Mr. *Herschell* would have been willing that we should have been told the real facts, so as to see whether there was any reason to believe the finding on the first issue to have been wrong. No attempt having been made to open or explain it, the only conclusion that I can come to is, that the verdict in answer to the first question is perfectly right according to the well settled law as to what constitutes fraudulent preference. I do not think that it is necessary in this case to give any opinion whether the words "with the view of giving such creditor a preference over the other creditors" have precisely the same meaning as the word "voluntarily" had before; but I rather think it would be found if all the authorities were examined, that "voluntarily," in the technical sense which it had under the old law, means practically the same thing as "with the view of giving such creditor a preference over the other creditors." Those words, no doubt, have been used because the word "voluntarily" was a deceptive word, having a technical meaning different from its common meaning, so that a payment which any ordinary person would call voluntary might in the technical sense not be so. I agree that this appeal should be dismissed.

Solicitors: Messrs. *Sole, Turner, & Turner;* Messrs. *Chester & Urquhart.*

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Ex parte LLYNVI COAL AND IRON COMPANY.
In re HIDE.

Bankruptcy—Disclaimer of Lease by Trustee—Proof by the Lessor for Injury—Bankruptcy Act, 1869, *s.* 23.

13 Eq 167
7 Ex 244
8 Ch 565-7
— 684
— 999
20 Eq 685
1 Ch D. 286
3 Ch D. 465-9
5 Ch D 373.
13 Ch D. 264
5 Ex D. 170
14 Ch D. 581
9 QBD 298
11 QBD. 95

The owners of certain houses entered into an agreement with *H.* to grant him a lease of the premises for ten years, at an annual rent of £500. After the first year *H.* filed a petition for liquidation by arrangement. The trustee under the liquidation disclaimed the agreement under the 23rd section of the *Bankruptcy Act*, 1869; and the lessors claimed to prove as creditors for the injury they had sustained "by the operation of the section":—

Held (reversing the decision of the Registrar), that they were entitled to prove under the section; and that the measure of the injury sustained was the difference between the rent to be paid under the agreement and what they could now obtain for the property.

The Registrar, sitting as Chief Judge, ought not to decide points of novelty and difficulty, but should reserve them for the opinion of the Chief Judge.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge.

On the 24th of July, 1869, the *Llynvi Coal and Iron Company, Limited*, entered into an agreement with *Henry Hide* to grant him a lease of five shops at *Maesteg*, in *Glamorganshire*, for ten years, at the yearly rent of £500; the lease to contain, among other things, covenants for payment of the rent and repair of the premises.

In April, 1871, *Hide* filed a petition for a liquidation by arrangement under the *Bankruptcy Act*, 1869, and a trustee of his estate was appointed.

On the 20th of May the trustee, in answer to an application by the company, formally disclaimed the agreement of the 24th of July, 1869, and all interest in the premises comprised therein.

The company thereupon claimed, under the 23rd section of the *Bankruptcy Act*, 1869, to prove as creditors against *Hide's* estate for the sum of £2348 18*s.* 6*d.*, in respect of injury done to them by the disclaimer of the trustee.

In support of their claim the company filed affidavits to prove that by reason of the shops having been closed, and the stock-in-trade sold by the trustee, the value of the property for trade

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purposes had been so much deteriorated that they could not now obtain a higher annual rent than £200; so that there would be a loss of £300 a year for the remainder of the term, and they calculated their claim on that footing.

On the other hand, *Hide* asserted that he had been induced to enter into the agreement by false representations of the value of the business; and that the company had, in fact, accepted for the first year of his tenancy a reduced rent of £300. The Registrar refused to allow the claim, and the company appealed from his decision.

Mr. *Winslow*, and Mr. *Lindley*, for the Appellants:—

The main question turns upon the construction of the 23rd section of the *Bankruptcy Act*, 1869 (1).

By the law as it stood before the passing of that Act, under the Bankruptcy Act, 1849, s. 145, and the *Bankruptcy Act*, 1861, s. 131, if the assignees of a bankrupt disclaimed a lease the interest remained in the bankrupt, and the lessor was either left with an insolvent lessee, or, in the event of the bankrupt surrendering the lease, he got back the property without any compensation for the loss occasioned by the disclaimer. The Act of 1869 has provided

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(1) 32 & 33 Vict. c. 71, s. 23. When any property of the bankrupt, acquired by the trustee under this Act, consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property; and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication; and if the same is a lease, be deemed to have been surrendered on the same date; and if the same be shares in any company, be deemed to be forfeited from that date; and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

Any person injured by the operation of this section, shall be deemed a creditor of the bankrupt to the extent of such injury, and may, accordingly, prove the same as a debt under the bankruptcy.

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a remedy for this injustice; the policy of the Legislature was, on the one hand, that the bankrupt should be freed from liability of every kind except for personal torts, and, on the other hand, that all persons who had claims of any kind against him should have the opportunity of proving against his estate. Consistently with this object, a lease is treated like other contracts. If the trustee accepts it, even though he should afterwards assign it to a pauper, the lessor would have his remedy against the bankrupt's estate on the covenants under the 31st section. If the trustee disclaims, the lessor gets back the property, and can make his claim under the 23rd section for the injury done to him.

The only question is, how is the amount of this injury to be estimated? We contend that it is the loss of the rent payable under the agreement, taking into consideration the present annual value of the property, which is sworn not to exceed £200. The fact that the lessee became insolvent makes no difference in estimating the loss; the Court will assess the damage as a jury would do in an action for breach of the contract.

With respect to the alleged misrepresentation, none has been proved. The bankrupt would have had no defence either to an action for the rent or to a suit for specific performance of the agreement.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the trustee:—

The injury referred to in the proviso at the end of the 23rd section is not injury from the breach of contract, but injury from "the operation of the section." Lessors are not injured at all by that section. On the contrary, they are benefited by it. Under the Act of 1861 the assignee might hold the land for six months, and take the emblements and then disclaim, leaving the landlord to deal as best he could with a bankrupt tenant, who might set him at defiance, and ruin his property. This section gives him back the land at once. But, assuming that the lessors have received some injury, in assessing the loss regard must be had to the insolvency of the lessee. The lessors claim to prove on the assumption that if the lease had not been put an end to, they would have received the full rent of £500 for the remainder of the term. But how would they have got that rent from an insolvent

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tenant? The utmost loss they have sustained through the disclaimer of the trustee is the dividend which they would have got from the estate if they had proved for the future rent under the 31st section.

We also contend that the rent originally received was extravagantly high, and that the agreement was obtained by misrepresentation, and cannot form the ground of a claim for damages.

In the course of the arguments,

The LORD JUSTICE JAMES said:—I feel bound to say that this is a question which ought not to have been decided by a Registrar. It is a question of general importance upon the construction of an entirely new section, and it is just the very kind of question which the Registrar ought to have referred to the Chief Judge. We have great cause to complain that we have not the advantage of the opinion of the Chief Judge.

The LORD JUSTICE MELLISH:—It is quite contrary to the intention of the Legislature that this should be a Court of Appeal from the decisions of the Registrars.

At the close of the arguments,

SIR W. M. JAMES, L.J., said:—

Upon the question of the right of proof I am satisfied that there can be no real question as to the intention of the Legislature. A great number of cases occurred, before the passing of the late Act, in which the bankrupt was left liable to several claims of various kinds, and the persons who had those claims were entirely excluded from any participation in the general division of the assets. Then came the Act of Parliament, which —dealing in express terms with almost every one of the cases which had ever previously occurred, and excluding nothing but demands for damages for personal torts—provided that there should be nothing whatever for which a right to proof should not be given. Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy, and to be ascertained either by the Court

5 Ch D 373

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13 Eq 187

itself or with the aid of a jury. The broad purview of this Act is, that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind. On the other hand, all the persons from whose claims, and from liability to whom he is so freed are to come in with the other creditors and share in the distribution of the assets. The 23rd section provides specially with regard to onerous contracts as to land, as to railway shares, as to services to be paid for, or anything else in the nature of an onerous contract; and it provides that, as to all such contracts, the trustee may disclaim them altogether. He may be disposed to take them if he thinks, upon the whole, they will be beneficial to the estate; but if he disclaims them, the bankrupt is relieved from them, and is no longer liable. In that case the creditor is entitled to prove for the injury.

The question then arises—What is the injury? This is the only point on which the Respondent's case, as it seems to me, will bear any argument. But I think it would be most unreasonable to say that the injury sustained by the lessor is the loss of the proof he would have had under the 31st section. It is said that if the 23rd section was not here he would be entitled to prove under the 31st; but he is deprived of that proof, and therefore may have a dividend on the dividend he has lost. The estate will produce say 2*s.* in the pound; he must, it is contended, prove for the dividend he would have received at that rate, and claim a dividend on that dividend. That cannot be a reasonable intention to be attributed to the Legislature. I am satisfied that the injury referred to in the section means the legal wrong that is done him. He is deprived of a certain contract, under which he was to recover a certain sum of money, and he is to prove against the estate for that which he would have had a right to recover or to sue for if he had not been deprived of that right by the bankruptcy.

A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at £500 a year, and who is then suddenly deprived of his employment; in such a case he would be entitled to prove for £500 a year, minus what he could reasonably

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get for his services in the market. In the same way a landlord who has made a contract for £500 a year, to be paid to him for the use of the land, is entitled to claim £500 a year, minus what he can get for the land from another tenant. It seems to me that that is the common sense of the Act of Parliament, and that there is nothing to compel the Court to put any construction upon it inconsistent with the common sense view.

But it is said that, in this case, there is a defence on this ground—that the contract itself is void or voidable in equity in consequence of some misrepresentation. I am of opinion that there was no misrepresentation which could have affected the lease, and that any attempt to resist specific performance of the contract, on the ground of misrepresentation, would have certainly failed. I think, therefore, that the landlord is entitled to prove for the difference between the rent which he reserved and the rent which the premises are fairly worth now under existing circumstances for the remainder of the ten years.

Sir G. Mellish, L.J.:—

3Ch D. 470

I am of the same opinion. I think that the main object of the Legislature, in all these sections, is perfectly clear. The Legislature, in Bankrupt Act after Bankrupt Act, has been trying to relieve the bankrupts from both their present and future liabilities upon contracts; but up to the passing of this last Act, that had been very incompletely provided for, and by the construction which has been put on previous sections, it was found that, notwithstanding the language used by the Legislature, a bankrupt did still remain liable on a variety of contracts which he had previously entered into. It is quite plain that the object of these sections is that the bankrupt shall be absolutely relieved from any liability under any contract he has ever entered into. And the bankrupt being so relieved, it is plainly also the intention of the Legislature that the person deprived of the right of action against the bankrupt, and of the benefit of the contract which he made with the bankrupt, should be turned into a creditor in respect of what the Act describes as the injury he has received. That, I think, must mean in respect of what he would have been entitled to recover against the bankrupt if the bankrupt had remained

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solvent. It would be contrary to every principle that in assessing the damages which could have been recovered against the bankrupt if he had not been made bankrupt, and for which proof is made, you are to take into consideration the fact of the bankrupt being insolvent, so that the amount of the proof is to depend upon the extent of his insolvency. Such could not have been the ChD 470 intention of the Legislature, nor do I think that it is the natural construction of the words. Take the case of an ordinary contract. The section says that if there is a contract which is a burdensome contract, not performed at the time of the bankruptcy, such as a contract to make a railway, to build a house or a ship, the contract itself is absolutely to be put an end to by the disclaimer of the trustee. What is the person who has entered into the contract to prove for? Surely he is to prove for the damage which could be recovered for the breach of the contract. That appears to me to be naturally enough described by the words of the section: "Any person injured by the operation of this section"—that is to say, any person deprived of any property, right of action, or contract which he had with the bankrupt—"shall be deemed to be a creditor of the bankrupt." To what extent? "To the extent of such injury." Surely that is the extent, measured as far as you can measure it in money, of the value of what could have been recovered against the bankrupt. In the case, for instance, of a contract to make a railway, it is obvious what the extent of the injury is. It is the difference between the sum for which the bankrupt has contracted to complete the railway and the sum for which somebody else will contract to complete it. It appears to me that it is just the same between a landlord and tenant. The landlord is deprived of the benefit of the contract of the bankrupt to take a lease, or of his covenant to pay rent, and he is to prove to the extent of that injury; that is to say, so far as you can estimate them, for what the damages would be for non-performance of the contract. The reference to sect. 31 appears to me to make that perfectly clear. 1QBD95 Sect. 23 only applies when there is a disclaimer. Assume that the trustee does not disclaim the lease, but passes it over to an insolvent person, then it is quite clear that under sect. 31 the landlord can prove against the bankrupt for damages for the future breach of that contract. What would those damages be? If the assignees assign to an insolvent person, practically they

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would be to the full amount: in fact, the damages would be larger, because in that case the landlord does not get the property back. Under sect. 23, in estimating the amount of damages, you are to take into consideration that the landlord regains possession of the property, and if he can get as much rent for the property afterwards as before, then the damages would be *nil;* if he gets less, it will be the difference.

Solicitors for the Appellants: Messrs. *Willoughby & Cox.*
Solicitors for the Respondent: Messrs. *Parker, Lee, & Haddock.*

Ex parte WISEMAN. *In re* KELSON, TRITTON, & CO.

L. JJ.
1871
Nov. 9, 10, 25.

8 QB 463

Indemnity—Contract, when broken—Debt payable on a Contingency—Bankruptcy Act, 1849, *s.* 178—*Bankruptcy Act*, 1861. *s.* 153.

K. & Co. having made a claim to bills of exchange, which were in the hands of *W.* as stakeholder, *W.* handed them over on *K. & Co.* giving him a guarantee to save and keep him harmless and indemnified from and against all claims and demands which might be made against him for the bills, and from and against all costs and damages which *W.* might sustain in consequence of handing over the bills; and further, that if proceedings were taken against *W.* in respect of the bills *K. & Co.* would save harmless and keep indemnified *W.* from all costs and damages by reason of such proceedings, and that if *W.* was ordered in such proceedings to give security, or bring money into Court, *K. & Co.* would procure such security, or provide *W.* with the money to be paid into Court, as the case might be. An adverse claimant brought an action against *W.* for the bills, which action *K. & Co.* defended by their own attorney, until *K. & Co.* executed a deed of inspectorship, which was registered under the *Bankruptcy Act*, 1861, and under which deed all creditors might prove who could have proved under an adjudication of bankruptcy of the same date. After this, judgment was recovered in the action against *W.*:—

Held, that *W.* was not a creditor who could have proved in bankruptcy under the *Bankruptcy Act*, 1861, s. 153, for that the contract did not contain any warranty of the title of *K & Co.* to the bills, nor any undertaking to pay their amount as soon as a valid claim was made against *W.* for them, but only an undertaking that *W.* should not sustain any loss or expense in respect of them, and that as *K. & Co.* had defended the action up to the date of the deed of inspectorship, the contract had not up to that time been broken.

Held, also, that the contract was not a contract to pay money upon a contingency, so as to give a right of proof under the Bankruptcy Act, 1849, s. 178.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting for the Chief Judge.

In 1862 and 1863 *Kelson, Tritton, & Co.* were the *London* agents of *Frith & Co.*, of *Bombay*, of which firm *F. Matthey* was a member. *Matthey* also employed *Kelson, Tritton, & Co.* as agents in transactions on his own account.

On the 4th of September, 1862, *Kelson, Tritton, & Co.* advanced for *Matthey* £2000 towards payment for goods bought for him by *Wiseman & Co.*, commission agents, and paid that sum to *Wiseman & Co.* It was verbally agreed between *Matthey* and *Kelson & Co.* that the latter should retain the money out of the proceeds of the sale of the goods. Afterwards *Kelson, Tritton, & Co.*, by *Matthey's* directions, instructed *Wiseman & Co.* to sell the goods. This was done, and *Wiseman & Co.* received in payment three bills of exchange dated 27th of February, 1863, for sums amounting to £2284, drawn by *Wiseman & Co.* upon and accepted by *Palmer & Co.*, and payable four months after date. *Matthey* died on the 20th of February, 1863.

On the 3rd of March, 1863, *Kelson, Tritton, & Co.*, being creditors of *Matthey*, issued an attachment out of the Lord Mayor's Court for £2183, under which the bills in the hands of *Wiseman & Co.* were attached.

Kelson, Tritton, & Co. after this applied to *Wiseman & Co.* to hand them over the bills, which *Wiseman & Co.* did; *Kelson, Tritton, & Co.* giving them a guarantee, dated the 29th of April, 1863, by which, after reciting the claim of *Kelson, Tritton, & Co.* to a lien on the bills, and their having been handed over by *Wiseman & Co.*, *Kelson, Tritton, & Co.* agreed with *Wiseman & Co.* to save and keep them harmless and indemnified of, from, and against all claims and demands which might be made on them, or any of them, for the said bills, or the proceeds thereof, and all loss, costs, charges, damages, and expenses which *Wiseman & Co.*, or any of them, should or might, on any account, or in any way suffer, sustain, or be put unto for, or by reason, or in consequence of their so handing over and giving up the said bills as thereinbefore mentioned. And *Kelson, Tritton, & Co.* further agreed with *Wiseman & Co.* that in the event of any proceedings either at law or in equity, or otherwise, being commenced against *Wiseman & Co.* in respect of the bills, or upon the account between *Wiseman & Co.* and *Matthey* in connection with the bills, or out of which the bills originated, *Kelson, Tritton, & Co.* would also save harmless and keep indemnified *Wiseman & Co.* from and against all costs, charges, damages, and expenses which they might suffer, sustain, or be put unto by reason or in consequence of such proceedings; and in the event of security being ordered to be given by *Wiseman & Co.* in any such proceedings, or their being ordered to bring any amount into Court under such proceedings, then, and in such case, *Kelson, Tritton, & Co.* would procure such security, or pay and provide *Wiseman & Co.* with the amount so ordered to be paid, as the case might be.

Shortly after *Matthey's* death proceedings in Chancery for administering his estate were taken, and by authority of the Court his personal representative on the 6th of November, 1863, brought an action against *Wiseman*, the surviving partner in the firm of *Wiseman & Co.* to recover the amount of the bills. *Kelson, Tritton, & Co.* defended this action by their own attorneys, and at their own expense, till May, 1865, when a decision on demurrer was given in favour of the Plaintiff. Before any further proceedings had been taken *Kelson, Tritton, & Co.* executed the deed of inspectorship hereinafter mentioned, after which *Wiseman* defended the action. On the 12th of July, 1865, a verdict was found for the Plaintiff, and on the 27th of July final judgment was signed for £2183 17*s.* 9*d.* and costs, which were taxed on the 4th of August, 1865, at £153 2*s.* 1*d.*

Wiseman paid the receiver of *Matthey's* estate the amount of damages and costs by three equal instalments on the 23rd of January, 7th of May, and 31st of May, 1866. The total amount of assets collected by the receiver was £3997, which, after deducting payments made by him and commission, was reduced to £2589.

On the 30th of June, 1865, *Kelson, Tritton, & Co.* executed a deed of inspectorship expressed to be made between the partners of the first part, the inspectors of the second part, and "the several persons, companies, and co-partnership firms who, at the date hereof, are respectively creditors of the said debtors, or any of them, or who would be entitled to prove under an adjudication of bankruptcy against the said debtors, founded on a Petition filed on the day of the date of these presents," of the third part. By this deed the debtors agreed to get in their assets under the direction of the inspectors, and from time to time divide, or assist in dividing

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them rateably among the creditors in the manner thereinafter provided, and to deposit all moneys received by them from the assets at a bank to such account as the inspectors should direct, and not to draw out any of such moneys without the consent of the inspectors, nor for any purpose except that of being applied for the purposes of the deed. And that if at any time before the estate was completely administered dividends to the amount of 20*s.* in the pound had not been paid, the debtors would, if the inspectors required it, assign all the outstanding estate to them to be administered as in bankruptcy. The deed contained a provision making it a bar to all proceedings by creditors in respect of their debts. This deed, on the 20th of July, was registered under clause 192 of the *Bankruptcy Act*, 1861. *Wiseman* did not assent to it, and disputed its being binding on non-assenting creditors.

In April, 1866, a claim made out by the inspectors in the name of *Kelson, Tritton, & Co.* against *Matthey's* estate was allowed in the suit at £5335 16*s.* 5*d.* with interest from 31st of December, 1863, being money due to them for commission and interest on sale of goods as agents for *Matthey*, and for share of profits on certain transactions on their joint account. In their account, by which the balance due to them was made out, they credited themselves with the £2000 paid to *Wiseman & Co.* and debited themselves with the bills for £2284.

On the 18th of August, 1869, *Kelson, Tritton, & Co.* received £1014, the first dividend on their claim from *Matthey's* estate, and on the 15th of July a further dividend of £110. These sums *Kelson, Tritton, & Co.* received without the knowledge of the inspectors and placed them in the hands of their private solicitors. On the 16th of March, 1870, *Wiseman* issued an attachment out of the Lord Mayor's Court for £2000, and attached the £1014 and £110 in the hands of the solicitors as being moneys of *Kelson, Tritton, & Co.*

In these circumstances the inspectors required *Kelson, Tritton, & Co.* to hand over these sums to be administered under the deed of inspectorship. *Kelson, Tritton, & Co.* urged that *Wiseman & Co.* were creditors, bound by the deed, and ought to be admitted as creditors for the amount of the bills of exchange with interest and costs. *Wiseman* denied that he was bound by the inspectorship

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deed, and insisted that he was entitled to sue *Kelson, Tritton, & Co.* on their indemnity, and to attach the moneys in their solicitors' hands.

A special case was agreed to for obtaining the opinion of the Court on the rights of the parties in the above state of circumstances, stating four questions for the opinion of the Court—first, whether *Wiseman*, as the surviving partner of *Wiseman & Co.*, was to be deemed a creditor within the trusts of the inspectorship deed, and, if so, for what amount he should be permitted to prove; secondly, whether *Wiseman* was entitled to treat the deed as not binding on him, and to sue *Kelson, Tritton, & Co.* on their contract of indemnity; thirdly, whether *Wiseman* was entitled to any lien on the £1014 and £110, by virtue of his proceedings in the Lord Mayor's Court; fourthly, whether *Kelson, Tritton, & Co.* had any claim on the last-mentioned sums, and any right to retain them towards satisfaction of what they might be called upon to pay to *Wiseman*, or whether they formed part of the trust estate under the inspectorship deed.

Mr. Registrar *Spring Rice*, sitting for the Chief Judge, held that *Wiseman* was a creditor bound by the deed, and entitled to prove for the £2183 17*s.* 9*d.*, but not for the £153 costs; and that neither he nor *Kelson, Tritton, & Co.* had any claim on the £1014 and £110, but that those sums must be applied under the inspectorship deed. *Wiseman* appealed.

Mr. *Swanston*, Q.C., and Mr. *Thesiger*, for the Appellant:—

There was not at the time of the execution of the deed of inspectorship any claim which could be proved under the Bankruptcy Act, 1849, s. 178. *Cary* v. *Dawson* (1); *Betteley* v. *Stainsby* (2); *Mitcalfe* v. *Hanson* (3); *Hankin* v. *Bennett* (4); on which point *Ex parte Barwis* (5) and *Adkins* v. *Farrington* (6) may also be referred to. Neither is there any right of proof under sect. 153 of the *Bankruptcy Act*, 1861: *Martin's Patent Anchor Company* v. *Morton* (7); *Johnson* v. *Skafte* (8); *Sharland* v. *Spence* (9). *In re*

(1) Law Rep. 4 Q. B. 568.
(2) Ibid. 2 C. P. 568.
(3) Ibid. 1 H. L. 242.
(4) 8 Ex. 107.
(5) 6 D. M. & G. 762. 2 Jur. N.S. 5.
(6) 5 H. & N. 586.
(7) Law Rep. 3 Q. B. 306.
(8) Ibid. 4 Q. B. 700.
(9) Ibid. 2 C. P. 456.

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Penton (1) may also be referred to. *Wiseman*, therefore, is not bound by the deed, and may pursue his remedies. The inspectorship deed did not assign *Kelson, Tritton, & Co.'s* property. The attachment therefore is good.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for *Kelson, Tritton, & Co*:—

Where a right to damages has accrued by breach of contract before adjudication, there is a right of proof under the Act of 1861, sect. 153: *Ex parte Mendel* (2). Here the contract was broken before the inspectorship deed, for it was in substance a warranty by *Kelson & Co.* that the bills were theirs, and a contract to pay if any valid claim was made. It was like a covenant that a vendor has good right to convey, which if his title be bad is broken as soon as made. Again, there is a right of proof under the Act of 1849, sect. 178: *Ex parte Barwis* (3); *dictum* of Baron *Martin*, in *Hankin* v. *Bennett* (4); *Adkins* v. *Farrington* (5).

Mr. *Roxburgh*, Q.C., and Mr. *A. L. Smith*, for the inspectors:—

Kelson & Co. had no right to receive the dividends from *Matthey's* estate, and withdraw them from administration under the inspectorship deed, and *Wiseman* knew of it. The attachment, therefore, is of no effect against the title of the inspectors.

Mr. *Swanston*, in reply:—

There was no warranty of title to the bills, but merely a covenant to indemnify *Wiseman* against the consequences if the title was bad, and till he suffered loss there was no breach: *Brough* v. *Oddy* (6); *Antrobus* v. *Davidson* (7). The right to prove under sect. 178 is negatived by *Kent* v. *Thomas* (8).

Nov. 25. SIR G. MELLISH, L.J., delivered the judgment of the Court as follows:—

This was an appeal on a special case, stated by consent for the

(1) Ibid. 1 Ch. 158.
(2) 1 D. J. & S. 330. 10 Jur. N.S. 189
(3) 6 D. M. & G. 762. 2 Jur. N.S. 5.
(4) 8 Ex. 107.
(5) 5 H. & N. 586.
(6) 1 Russ. & My. 55.
(7) 3 Mer. 569.
(8) Law Rep. 6 Ex. 312.

opinion of the Court of Bankruptcy, between *James Wiseman*, of the first part, the members of the late firm of *Kelson, Tritton, & Co.*, of the second part, and the inspectors under a deed for winding up their estate under inspection, which had been executed on the 30th of June, 1865, of the third part.

There were four questions for the opinion of the Court. [His Lordship read the questions.]

The answer to the two first questions depends upon a contract of indemnity, which is set out at length in the 5th paragraph of the case. On the 6th of November, 1863, an action was brought by the administrator of Mr. *Matthey* against Mr. *Wiseman*, to recover the proceeds of the bills of exchange, with interest. It is not stated in the case by which of the parties the action was defended. On the hearing before us it was admitted that the action was defended by *Kelson, Tritton, & Co.*, through their own attorneys, up to May, 1865, when a demurrer, which had been joined in the action, was decided in favour of the Plaintiff. Shortly after this *Kelson, Tritton, & Co.* stopped payment; and the defence to the action was thenceforth, with the consent of *Kelson, Tritton, & Co.*, conducted by Mr. *Wiseman*, through his attorney. On the 12th of July, 1865, which was after the inspectorship deed was executed, the Plaintiff in the action obtained a verdict against Mr. *Wiseman* for £2183 17*s.* 9*d.*; and shortly afterwards the Plaintiff obtained final judgment for that sum and £153 2*s.* 1*d.* costs. Mr. *Wiseman*, in the year 1866, paid the whole amount so recovered against him in three instalments to *Matthey's* estate, which was being wound up in the Court of Chancery. The question, then, is whether, under these circumstances, *Wiseman* was a creditor who, if *Kelson, Tritton, & Co.* had become bankrupt on the 30th of June, 1865, would have been entitled to prove against their estate for the proceeds of the bills of exchange, with interest and costs, or any of such sums; and this appears to us to depend upon what the true effect of the contract of indemnity is.

It was contended before us that the contract of indemnity amounted to a warranty on the part of *Kelson, Tritton, & Co.* that they were the persons truly entitled to the bills of exchange, or at any rate to an engagement on their part, that if a valid claim was made by *Matthey's* representative against *Wiseman* to recover the proceeds of the bills of exchange, they would forthwith pay the amount of the bills of exchange with interest. If that was the true construction of the contract, then no doubt it would follow that the contract was completely broken before the inspectorship deed was executed, and the case would come within the 153rd section of the Act of 1861. We are of opinion, however, that this is not the true construction of the contract. We think there is no warranty that *Kelson, Tritton, & Co.* were entitled to the bills, nor any promise that if a valid claim was made by *Matthey's* representative, *Kelson, Tritton, & Co.* would forthwith pay the proceeds of the bills with interest. The contract appears to us distinctly to contemplate that *Kelson, Tritton, & Co.* might, if they pleased, cause the action to be defended; and we think, that if *Kelson, Tritton, & Co.* had continued to defend the action through their own attorney, and then had paid the full sum recovered and the costs to *Matthey's* representative as soon as judgment was signed and before execution could be issued against *Wiseman*, the contract would never have been broken at all.

We are of opinion, therefore, that no breach of the contract had been committed previous to the execution of the deed of inspectorship under which the amount of the bills could have been recovered as damages. If the contract had been broken at all, and the special case does not shew that it had, it had only been broken by *Wiseman* having been allowed by *Kelson, Tritton, & Co.* to incur a debt to his own attorney in defending this action between the time when they stopped payment and the execution of the deed of inspectorship; and for this breach we think that the amount of that debt was the only damages that could be recovered.

We are of opinion, therefore, that the proof for the amount of the bills of exchange, which has been allowed by the Registrar, cannot be supported under the 153rd section of the Act of 1861.

It is next contended, on behalf of the Respondents, that the amount of the bills, with damages and costs, was a sum which *Kelson, Tritton, & Co.* were liable to pay upon the contingency of the action being decided in favour of the Plaintiff, and that, therefore, this sum could be proved under the 178th section of the 12 & 13 Vict. c. 106.

It appears to us, however, that the contract of indemnity was

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not confined to the sum recovered by the judgment. It is clear, indeed, that *Wiseman's* own costs in defending the action were included in the indemnity; and we think that every time that *Kelson, Tritton. & Co.* allowed *Wiseman* to contract a debt with his own attorney, or to advance money in payment of his own costs of the action, the contract was broken. So also, after the final judgment was obtained, further legal proceedings might have been taken either by *Wiseman* himself to reverse the judgment, or by the Plaintiff to enforce it against him, from which *Wiseman* might sustain further damages and costs against which he would be entitled to be indemnified. The contract therefore appears to us not to be a contract to be performed once for all on the happening of a single contingency, but to be a contract which was liable to be broken repeatedly at different times upon the happening of various contingencies, whilst separate damages could be recovered under each such breach. We are of opinion that *Warburg* v. *Tucker* (1), *Mitcalfe* v. *Hanson* (2), *Cary* v. *Dawson* (3), and *Betteley* v. *Stainsby* (4), are decisive authorities, that the liability of a bankrupt under such a contract is not within the 178th section of the Act of 1849.

Moreover, in *Betteley* v. *Stainsby*, Mr. Justice *Willes* and Mr. Justice *Keating*, who were the only Judges before whom the case was heard, both express an opinion that a liability under a contract of indemnity is not a liability to pay money at all within the 178th section; and we agree in that opinion. We think that, to come within the section, the bankrupt must be made liable by the contract itself to pay money. Here the contract is to indemnify, and although that contract might have been performed by paying money to *Matthey's* representative, it might also have been performed in any other way by which *Matthey's* representative might have been induced to abandon and release the claim against *Wiseman*. *Maples* v. *Pepper* (5) is also an authority that a liability to pay damages for the breach of a contract, where the contract itself is not a contract to pay money, is not within the 178th section. On the whole, we are of opinion that *Wiseman* was not

(1) 5 E. & B. 384. 4 Jur N.S. 1142
(2) Law Rep. 1 H. L. 242.
(3) Law Rep. 4 Q. B. 568.
(4) Ibid. 2 C. P. 568.
(5) 18 C. B. 177.

entitled or bound to prove the amount of the bills against the estate of *Kelson, Tritton, & Co.*

The two last questions in the special case relate to two sums of £1014 17*s.* 3*d.* and £100 3*s.* 8*d.* After *Wiseman* had paid the sums recovered from him by *Matthey's* representative to the receiver of *Matthey's* estate in the Court of Chancery, the inspectors of *Kelson, Tritton, & Co.* made out their account against the estate of *Matthey*. In that account both the advance of the £2000 to *Matthey* and the payment by *Wiseman* of the bills of exchange are debited and credited. *Kelson, Tritton, & Co.* afterwards received the said two sums as dividends from *Matthey's* estate, and handed them to their solicitors. *Wiseman* then commenced proceedings in the Lord Mayor's Court against *Kelson, Tritton, & Co.* for the breach of the contract of indemnity, and caused the two sums to be attached. The question is—to whom do these sums belong? and we agree with the Registrar that they belong to the estate of *Kelson, Tritton, & Co.*, which is to be distributed among their creditors by the inspectors. They represent a debt due to *Kelson, Tritton, & Co.* at the time they executed the deed of inspectorship, and we are of opinion that neither *Kelson, Tritton, & Co.* nor any subsequent creditor of *Kelson, Tritton, & Co.* is entitled to prevent these sums being distributed by the inspectors under the deed of inspectorship. It is true that the figures stated in the special case prove that these sums must have been in great part paid out of the sums paid by *Wiseman* to the receiver of *Matthey's* estate, but we do not think that this can make any difference.

We answer the four questions stated in the special case as follows:—

1st. Mr. *Wiseman*, as the surviving partner of the firm of *Wiseman & Co.*, is not to be deemed and considered a creditor under the trusts of the inspectorship deed.

2nd. Mr. *Wiseman* is entitled to treat the deed as not in any way binding on him, and to maintain an action at law against Messrs. *Kelson, Tritton, & Co.* for breach of the contract of indemnity.

3rd. Mr. *Wiseman* is not entitled to any lien upon any of the aforesaid sums of £1014 17*s.* 3*d.* and £110 3*s.* 8*d.* by virtue of the proceedings taken by him in the Lord Mayor's Court.

4th. Messrs. *Kelson, Tritton, & Co.* have not any claim upon the

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said sums of £1014 17*s.* 3*d.* and £110 3*s.* 8*d.*, nor any right to retain and apply the same towards satisfaction of what they may be called upon to pay Mr. *Wiseman.* The two sums form part of the trust estate under the inspectorship deed.

We are of opinion that the inspectors should have their costs out of the estate, both in the Court below and before us, but that Mr. *Wiseman* and Messrs. *Kelson, Tritton, & Co.* should bear their own costs in both Courts.

The case must be remitted to the Court of Bankruptcy to make the orders which the parties have agreed upon in accordance with our answers to the questions.

Solicitors: Messrs. *Linklater & Co.*; Messrs. *Janson, Cobb, & Pearson*; Messrs. *Mackenzie, Trinder, & Co.*

In re DURHAM COUNTY PERMANENT BENEFIT BUILDING SOCIETY.

Ex parte WILSON.

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1871
Nov. 25.

8 ChD. 29
35,

Jurisdiction—Submission to Judge acting in Winding-up—Right of Appeal.

Questions having arisen between the official liquidator of a company and a mortgagee with whom the trustees had deposited deeds belonging to the company, with respect to the validity of the security, the parties signed an agreement that their rights should be determined in a summary way by the Judge acting in the matter of the winding-up:—

Held, on the construction of the agreement, that this was a submission to the Judge personally, and that no appeal could be brought to the Court of Appeal in Chancery.

THIS was an appeal from an order made by Vice-Chancellor *Bacon*, in the winding-up of the *Durham County Permanent Benefit Building Society* (1).

The trustees of the society, previously to the commencement of the winding-up, deposited certain mortgage deeds executed by members of the society with the Rev. *W. Wilson* as a security for £200 borrowed by them under one of the rules of the society.

The official liquidator disputed the validity of the security, and, in order to facilitate the settlement of the question, the official liquidator and Mr. *Wilson* signed an agreement dated the 6th of April, 1871.

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(1) Law Rep. 12 Eq. 516.

By this agreement—after reciting the order for winding-up, and the deposit of deeds, and that questions had been raised by the official liquidator as to the validity of the said transaction, and as to the right of the said society to pledge or deposit any of the securities of the members; and also reciting that for the purpose of enabling the mortgagors of the said premises to redeem the said securities, and of avoiding as far as possible litigation between the said official liquidator and the said *W. Wilson* with reference to the said deposit of securities, it was provided that the agreement should be subject to the sanction of the Vice-Chancellor acting in the matter of the winding-up of the said society, to be obtained on or before the 1st day of May next; that the said *W. Wilson* should, upon request of the said official liquidator, hand over to him the deeds and documents of title, if any mortgagor should be desirous of redeeming his security, or if the said official liquidator should realise the same, and he should, if necessary, join in any receipt or discharge for the mortgage moneys; and that the amount due to the mortgagor should be ascertained and settled between the official liquidator and the mortgagor, and, when paid, should be carried to a separate account in the winding-up.

The agreement then contained the following clauses:—

"The moneys received by the said official liquidator under this agreement, and passed to the said account, shall be retained until the question of the right to the same has been ascertained and determined by the Court of Chancery, under the winding up of the said society, or until either of the parties shall have given notice to the other of the relinquishment of his claim to the moneys received under this agreement, in which latter case the party giving such notice shall do all necessary acts for the purpose of paying or handing over all moneys and securities come into possession under this agreement."

"In case of any difference or dispute in any manner arising under this agreement, the same shall be settled by the Chief Clerk of the Vice-Chancellor to whose Court the winding-up of the said society is attached."

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"The rights of the parties hereto shall be determined as they existed immediately before signing and entering into this agreement, and shall be fully and effectually determined in a summary way by the Judge acting in the matter of the winding-up of the said society."

Under this agreement, the official liquidator took out a summons before the Vice-Chancellor, calling upon Mr. *Wilson* to give up the deeds without any payment being made to him. The Vice-Chancellor refused to make the order, and the official liquidator appealed from his decision.

Mr. *Fry*, Q.C., and Mr. *Higgins*, for the official liquidator.

Mr. *Cotton*, Q.C., and Mr. *Caldecott*, for Mr. *Wilson*.

On the appeal being opened,

SIR W. M. JAMES, L.J., said:—I am of opinion that we have no jurisdiction in this matter. The parties have agreed to have the questions between them decided in a summary way by the Judge acting in the matter of the winding-up. I understand that to mean the Judge personally. It seems to me that an appeal was just what they wished to avoid. I wish it, however, to be understood that I decide this on the intention of the parties expressed in this agreement. It would have been different if they had submitted generally to have the questions decided by the Court of Chancery in the winding-up. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Lewis, Munns, & Longden;* Mr. *R. Ellis.*

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COUSENS *v.* COUSENS.

[1869 C. 58.]

Costs—Taxation—Three Counsel.

Port. 513-5-6, 514 add
19 Eq 477-8-9
20 Eq 654.

Where a junior counsel who has prepared the pleadings for a party to a cause is called within the bar before the hearing, and after a leader has been retained, then, if the case is of such a description as to make the retaining a leader at that stage of the cause proper, the costs of three counsel at the hearing ought to be allowed.

THIS was a motion by the Plaintiffs by way of appeal from a decision of Vice-Chancellor *Bacon* refusing to direct the Taxing Master to review his taxation.

The suit was a cross suit. The bill in the original cause was settled and signed by Mr. *Eddis*, and Mr. *Kay* was retained as leading counsel. After this the Defendants in the original cause filed this cross bill against the Plaintiff in the original cause. The Defendant in the cross cause did not give a retainer in it to Mr. *Kay*, but Mr. *Eddis* settled and signed the answer. Before the causes were ready for hearing, Mr. *Eddis* was called within the Bar, and the Defendant in the cross cause gave briefs in both causes to Mr. *Kay*, Mr. *Eddis*, and a junior. The Plaintiffs in the cross cause were substantially successful as Defendants in the original cause, but their cross bill was dismissed with costs.

The Taxing Master, in taxing the costs of the Defendant in the cross cause, allowed the fees of three counsel, which was one ground of objection.

The second ground of objection was this: the Defendant in the cross cause marked his briefs in the two causes alike—thirty-five guineas, thirty guineas, and twenty-five guineas. The Plaintiffs in the cross cause marked lower fees in the cross cause than in the original cause; marking in the latter thirty-five guineas to the leader, and twenty-five to the junior, and in the cross cause only fifteen guineas to the leader and ten guineas to the junior. They objected to the fees marked by the Defendant in the cross cause as being excessive.

As to the first objection, the Taxing Master stated: "Mr. *Eddis*

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had been the Defendant's junior in the suit, but prior to the hearing took silk. The practice in this office, prior to the decision in *Horsley* v. *Cox* (1) by Lord *Romilly*, was to disallow the costs of the third counsel in such cases; and I conceive that I am bound, whatever my opinion may be, to follow that case until a court of co-ordinate or superior jurisdiction has ruled otherwise."

On the objection as to the amount of fees, after noticing the fees marked by the parties respectively, he observed: "I think the fees in question large, but I do not think that they are so grossly excessive as to render it proper for me to interfere with the discretion of the solicitor, whatever the Court may be inclined to do, or that they were divided into moieties with any unfair intent; and I have therefore overruled those objections."

Mr. *Morgan*, Q.C., and Mr. *Lindley*, for the Appellants:—

The pleadings in this case, no doubt, were heavy, but not so heavy that the fees of a third counsel should be allowed on that ground alone, as in *Pearce* v. *Lindsay* (2). In *Carter* v. *Barnard* (3), where the junior had taken silk, the fees of a third counsel were allowed—but only because the case was extraordinarily complicated; and in *Green* v. *Briggs* (4) they were disallowed.

[The LORD JUSTICE JAMES:—It does not appear that in that case a retainer had been given to a leader before the junior was called within the Bar.]

No retainer was ever given to Mr. *Kay* in this cause.

[The LORD JUSTICE JAMES:—That is wholly immaterial, as he had been retained in the original cause.]

The case of *Midland Railway Company* v. *Brown* (5) shews the principle, and we submit that the fees here, as in that case, ought not to be allowed. *Horsley* v. *Cox* is opposed by two cases, and ought not to be followed. Then as to the quantum of fees——

[The LORD JUSTICE JAMES:—We cannot enter upon that; this Court cannot undertake the office of the Taxing Master.]

Mr. *Robinson*, for the Respondents, was not called upon.

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(1) Law Rep. 7 Eq. 464.

(2) 1 D. F. & J. 573.

(3) 16 Sim. 157.

(4) 7 Hare, 279.

(5) 10 Hare, App. xliv.

17 Jun 970.

BIBL. LONDIN UNIV.

L. JJ.
1871
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COUSENS.

SIR W. M. JAMES, L.J.:—

I am of opinion that this appeal motion must be refused with costs. I do not say that in every case in which the junior counsel who has drawn the pleadings has been called within the Bar before the hearing the costs of three counsel ought to be allowed. The question appears to me to be whether the case is of such a description that the having retained a leader before the junior was called within the Bar was reasonable and proper. If it be such a case, then, if the junior is called within the Bar, it is reasonable that his services should be retained; it is necessary to employ a junior; and unless a brief be given to the leader who has been retained his retainer is thrown away. In such a case the having three counsel is reasonable, and the expense is not an expense of luxury which the adversary cannot be called upon to pay. The question as to the quantum of fees ought never to have been brought here. The Taxing Master considered that the fees were not such as to call for his interference, and we shall not interfere with his discretion.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Flux & Co.*; Mr. *H. W. Vallance.*

L. JJ.
1871
Nov. 11.

In re CHESHIRE.

Practice—Chancery or Lunacy—Ecclesiastical Commissioners—23 & 24 Vict. c. 124, s. 38.

Where the interest under a lease made by an ecclesiastical corporation is vested in trustees without power of sale, and the person entitled to the rents is, through unsoundness of mind, incapable of consenting to a sale, the order sanctioning such sale is to be made in Chancery and not in lunacy.

THIS was a Petition for liberty to sell to the Ecclesiastical Commissioners a leasehold interest, one of the equitable tenants for life of which was a person of unsound mind not so found by inquisition.

L. JJ.
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In re CHESHIRE.

The leasehold was demised in 1842 by the Dean and Chapter of *Peterborough* to *Thomas Cheshire* for the lives of three persons, and the survivors and survivor of them. *Cheshire*, by his will, gave his residuary real and personal estate to trustees upon trust (beside other trusts which had determined) to pay to *H. T. Chapman* an annuity of £100 for his life, and subject thereto to pay the rents to the testator's daughters *Eliza Cheshire* and *Caroline Cheshire* during their joint lives in equal shares, and after their respective deceases to pay the rents in manner therein mentioned, and after the decease of the survivor of them upon trust to sell the property.

The testator died in 1845. *Caroline Cheshire* was of unsound mind, but not so found by inquisition. Some time after the testator's death the property (subject to the lease) had become vested in the Ecclesiastical Commissioners. One of the lives in the lease having dropped, the Commissioners refused to renew, but agreed, subject to the approbation of the Court, to purchase the leasehold interest for £800.

The present Petition was presented by *Cattel*, the trustee of the will, and *Eliza Cheshire, Caroline Cheshire*, by her next friend, and *H. T. Chapman*, In the Matter of *Caroline Cheshire*, a person of unsound mind, and of the estate of *Thomas Cheshire*, and of the Act 23 & 24 Vict. c. 124; and asked that the trustee might be at liberty to sell according to the agreement. It was intituled both in Lunacy and in Chancery.

The statute 23 & 24 Vict. c. 124, s. 38, provides, that if an ecclesiastical lease is vested in trustees without power of sale, the trustees may sell, with the consent in writing of the person beneficially entitled to the rents, "or, if there shall be no person capable of giving consent," then, "with the sanction and approbation of the Court of Chancery, to be obtained on petition to the said Court."

Mr. *O. A. Saunders*, appeared for the Petition, which was placed among the lunatic petitions.

THEIR LORDSHIPS stated their opinion to be that it ought to have been presented in Chancery, and objected to making an order. On being informed, however, that the Petition was inti-

L. JJ.
1871
In re
Cheshire.

tuled in Chancery as well as in Lunacy, their Lordships made the order, stating at the same time that they did so by virtue of their original jurisdiction in Chancery, and directing the order to be drawn up in Chancery only.

Solicitors: Messrs. *Clarke, Son, & Rawlins.*

L. JJ.
1871
Nov. 25.

21 ChD 619

In re GIBSON, A SUPPOSED INSANE PERSON.

Lunatic—Past Maintenance—Lunacy Regulation Act, 1862.

A person of unsound mind, not found so by inquisition, was kept by her brothers in a private asylum from 1838 to 1859, at a total expense of more than £700. The brothers having suffered losses in trade, and being unable further to support her, she was kept in a county asylum, at the expense of the county, from 1859 to 1871, the total expense exceeding £300. In 1871 a legacy was paid to her brothers, which by a will was directed to be paid to them to be applied for her benefit. This legacy was ordered to be retained by the brothers for her past maintenance in preference to the claims of the county, the brothers undertaking to maintain her in future; and, *semble*, they would, even without giving this undertaking, have been entitled so to be repaid for past maintenance.

Christina Gibson, a person of unsound mind, but not found so by inquisition, was kept in a private lunatic asylum at the expense of her brothers, *Thomas Gibson* and *Alexander Gibson*, from 1838 to 1859, at an expense of more than £700 in the whole. In that year her brothers, having had losses in business, became unable to continue to support her, and she was placed in the *Colney Hatch Asylum*, where she was thenceforth kept at the expense of the county of *Middlesex*.

In February, 1871, the sum of £641 7*s.* 10*d.* was paid to *Thomas Gibson* and *Alexander Gibson*, being a share of the residuary estate of *F. Scott*, who bequeathed it to *Christina Gibson*, but directed his trustees to pay it to them, "as acting for and in behalf of their said sister, and whose receipt, as managing for her, shall be a sufficient exoneration and discharge to my said trustees, recommending to them the care of their said sister, and to apply the bequest hereby made to her for her benefit, at such times and in such manner as to them may seem most for her interest."

Thomas Gibson thereupon communicated with the Commissioners in Lunacy, and arrangements were made for removing the lunatic to a private asylum, and purchasing for her a life annuity with the £641 7*s*. 10*d*.; but before it had been carried out a claim was made on *Thomas Gibson* by the treasurer of the county of *Middlesex* for £309 16*s*. 4*d*., for the past maintenance of the lunatic in the county asylum.

On the 9th of September, 1871, the Commissioners in Lunacy reported that the income of the lunatic's property was not duly applied for her benefit. It was thereupon referred to the solicitor to the suitors' fund to take proceedings for the purpose of protecting the lunatic's property, and making her income available for her maintenance, and it was arranged that a Petition should be presented by *Thomas Gibson* stating the above facts. The Petition prayed that the costs of the Petitioner might be paid, and that the Petitioner and *Alexander Gibson* might be directed whether they should retain the balance in satisfaction of what they had expended on the maintenance of the lunatic, or whether they should pay the claim of the treasurer of the county of *Middlesex*, and from time to time repay him the further sums which he might expend for her maintenance at *Colney Hatch*, so far as the property would extend.

Mr. *Cracknall*, for the Petitioner, referred to *Re Macfarlane* (1), and stated that his client was willing to give the same undertaking as was given in that case to provide for the future maintenance of the lunatic, upon receiving the fund for past maintenance.

Mr. *Methold*, for the solicitor to the suitors' fund, referred to the *Lunacy Regulation Act*, 1862 (25 & 26 Vict. c. 86), sects. 12, 13.

Mr. *Schomberg*, Q.C., for the justices of *Middlesex* :—

It is quite clear that the justices are entitled to be repaid out of this fund, unless the Petitioner can make out a prior claim. This, I submit, he cannot do, for his maintaining the lunatic was a voluntary act which creates no debt.

[The LORD JUSTICE MELLISH :—A lunatic cannot contract for 2 H. D

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(1) 2 J. & H. 673. 8 Jur. N.S. 209.

L. JJ.
1871
In re GIBSON.

his maintenance, so whoever maintains him becomes a creditor by implied contract.]

If there be a debt it is barred by the *Statute of Limitations.*

The LORD JUSTICE JAMES :—The holders of the fund cannot be obliged to set up the statute against themselves.

SIR W. M. JAMES, L.J. :—

The Petition must be amended by making *Alexander Gibson* a co-Petitioner, and, upon the Petition so amended, I am of opinion that the Petitioner is entitled to an order. The lunatic was maintained by her brothers for some years, and it is the regular course of the Court to apply a lunatic's property in payment of past maintenance. When property comes in it is right and honest that past maintenance should be paid for. I think the brothers would have been entitled to this, even without giving the undertaking which they have offered.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors: Messrs. *Denton, Hall, & Barker;* Messrs. *Johnson & Master;* Messrs. *Allen & Son.*

In re LONDON AND MEDITERRANEAN BANK.

L. C.
1871
Nov. 3.

WRIGHT'S CASE.

Shareholder—Allotment—Misrepresentation—Grounds for Cancellation.

The cancellation of shares by directors, where the shareholder has valid grounds to claim cancellation, is good and effectual, although the shareholder claimed such cancellation on invalid grounds, not being at the time aware of the existence of valid grounds.

In the prospectus of a company it was untruly stated that 80,000 shares had been subscribed for. *W.*, relying on this statement, applied for shares, and had ten shares allotted to him, on which he paid the deposit. The committee of the *Stock Exchange* refused to grant a settling day, whereupon *W.* wrote to the directors that they ought to return the deposit. The shareholders at a meeting agreed that the allottees were entitled to have their allotments cancelled. Thereupon *W.* received back his deposit money, and returned his share certificates, and an entry was made in the register of shareholders that his shares were cancelled. The company was afterwards wound up, and *W.* then discovered the misrepresentation as to the number of shares subscribed for:—

Held (reversing the decision of *Wickens*, V.C.), that the cancellation of the allotment was valid, the directors having been aware of the misrepresentation though the shareholder was not aware of it; and that *W.* was not a contributory either as a present or past member.

13 Eq 570
15 Eq 277
5 Ch D 528
12 Ch D 199
202
23 Ch D 428

IN April, 1865, a company, called the *London and Mediterranean Bank, Limited,* was registered as having a capital of £2,000,000, in 100,000 shares of £20 each.

A prospectus was issued stating, amongst other things, that 80,000 shares had been already subscribed for, which statement, as it subsequently appeared, was untrue. Mr. *Wright,* on the 4th of May, applied for fifty shares, which were alloted to him. He paid the deposit, and received the share certificates.

The committee of the *Stock Exchange* refused to grant a settling day to the company, on the ground that a sufficient number of shares had not been allotted; but it did not appear that Mr. *Wright* was aware of the reason, or that he was aware of the misrepresentation as to the number of shares subscribed for until it came out on some of the proceedings in Court under the winding-up.

On the 6th of October Mr. *Wright* wrote to the company, objecting to a proposed amalgamation of the company with another company, and saying that, after the committee of the *Stock Exchange* had refused to grant a settlement, the directors ought to return the money to the subscribers.

On the 18th of October the shareholders held a meeting, in which they approved of the amalgamation; they also resolved that, in consequence of the refusal of the committee to grant a settling day, all persons to whom shares had been allotted were entitled to have their allotments cancelled, and their money returned without interest. Notice of this was, on the 20th of October, sent to Mr. *Wright*, who thereupon returned his share certificates, and he afterwards received from the directors of the company a check, dated the 2nd of November, for the amount of his deposit. In the register of shareholders was written opposite to his name, "Money returned, and allotment cancelled;" but there was no direct evidence as to when or by whom this writing was made.

On the 6th of November, 1865, a meeting of the shareholders was held, at which a resolution was passed for winding up the company voluntarily, and on the 22nd of November this resolution was confirmed.

In June, 1866, this voluntary winding-up was ordered to be continued under supervision; but it appeared that the voluntary winding-up was, at the time, intended only to facilitate the amalgamation.

Mr. *Wright's* name was placed by the Vice-Chancellor *Stuart* upon the general list of contributories (1), but was removed by the Lords Justices on appeal (2).

The liquidators of the company then placed his name on the B list of contributories as a past shareholder, and the Vice-Chancellor *Wickens* refused to remove it, as reported (3), where the facts of the case are more fully stated.

Mr. *Wright* appealed.

The *Solicitor-General* (Mr. *Jessel*), Mr. *Karslake*, Q.C., and Mr. *Everitt*, for the Appellant:—

The Vice-Chancellor seems to have thought that this case was governed by *Oakes* v. *Turquand* (1); but that does not apply where the name, as in this case, was not on the register when the winding-up order was made. The name is actually off the list, and what reason is there for putting it on, when Mr. *Wright* could, if he had not known that his name was off, at any time have filed his bill, and had it taken off? What was he to do? He could not file a bill to have that done which was done. Was he to write a letter, and say what he had found out after the company was wound up? *Wright* could avoid the contract on one ground, and it makes no difference that he selected another so long as the directors acceded. There can be no occasion to have a suit for the purpose of doing what is right: *Ross* v. *Estates Investment Company* (2); *Reese River Silver Mining Company* v. *Smith* (3). This must be treated as an application to put his name on the register, to which it is a sufficient answer that the contract was fraudulent and void. If *Wright* did not know about the fraud, the directors did, and were quite right in not waiting for a suit.

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(1) Law Rep. 12 Eq. 334, n. (2).

(2) Law Rep. 12 Eq. 335, n.

(3) Law Rep. 12 Eq. 331.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the liquidators:—

No doubt if *Wright* had repudiated the contract on the ground of fraud, and the directors had assented, he could not be held liable. But he did not; he considered himself a shareholder, and only asked the directors to do what he thought fair, and they had no right, therefore, to cancel the shares in that way. He has never repudiated: *Ashley's Case* (4). He was a speculator, and merely objected because there was no settling day. The rescission was a voluntary and unauthorized act, which cannot be made good by something which was afterwards found out. *Wright* does not attempt to say that it was the misrepresentation which induced him to take the shares, and unless it was he cannot avoid them on that ground: *Western Bank of Scotland* v. *Addie* (5). All the cases cited were much stronger as to misrepresentation: so in *Bridger and Neill's Case* (6), and *Creyke's Case* (7). No one knows who made the entry on the register, or when it was made. Suppose that an officer of the company had chosen to remove the name of this shareholder without any authority, would that be enough? The shareholder must take instant action when he discovers the fraud; but this shareholder did nothing whatever, and has, by his laches, lost his right to complain: *Lawrence's Case* (1). A shareholder ought not to be allowed to bolster up an untenable case in this way: *Dixon's Case* (2). At all events he could not be released as to the past debts of the company.

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(1) Law Rep. 2 H. L. 325.
(2) Ibid. 3 Ch. 682.
(3) Ibid. 4 H. L. 64.
(4) Law Rep. 9 Eq. 263.
(5) Ibid. 1 H. L., Sc. 145.
(6) Ibid. 4 Ch. 266.
(7) Law Rep. 5 Ch. 63.

LORD HATHERLEY, L.C., after stating the facts, and that it was clear that a settling day had been refused because the committee of the *Stock Exchange* were not satisfied as to the allotment of shares, continued:—

Under those circumstances Mr. *Wright* was clearly entitled, as soon as he ascertained them, to put an end to the contract altogether; the contract was, according to the decision in *Oakes* v. *Turquand* (3), voidable by him; for I take it to be clear upon the evidence that this was a material misrepresentation so far as regards the object which Mr. *Wright* had in taking the shares. The fact that a settling day had been refused was calculated to excite suspicion, but was not enough, in the face of the positive statement in the prospectus, to fix him with notice of the real state of things. [His Lordship then read Mr. *Wright's* letter.] He wrote to say that he thought the concern ought to be put an end to and the money returned. It is true that he might not be entitled to this, as expenses might have been incurred, but he only says what he thinks the directors ought to do as honest men. He was then informed that he could have the shares cancelled and the money returned without interest. Mr. *Wright* had therefore pressed the directors to cancel his allotment, because no settling day could be obtained, and the directors, knowing the reason, agreed to cancel the allotment upon certain terms, which he accepted. He took the money, returned the share certificates, and was told that the shares were cancelled; and in the books we find an entry that the shares were cancelled. It was said that there was nothing to shew when this entry was made, but I must take it *primâ facie* that the entry was made on the 2nd of November, when the money was paid. It was argued that the shares could not be said to have been cancelled *ab initio*, because no interest was paid; but that fact merely amounts to this, that the directors made a bargain with the shareholder, and he waived the interest on being relieved from the shares.

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(1) Law Rep. 2 Ch. 412.
(2) Law Rep. 5 Ch. 79.
(3) Law Rep. 2 H. L. 325.

It is quite true that without a case of fraud which he could allege against the directors, he would not be entitled to demand the cancellation of the shares; but still that was the thing he bargained for, if he could get it; and here I have the satisfaction of proceeding on the same ground as the Vice-Chancellor, who says it was intended by both parties to put the shareholder in the same position as if he had never been on the register. The question is whether it could properly be done, and the case in this respect is singular. I will take Mr. *Wright* to have made a demand on the honour and fair dealing of the directors, as making it incumbent on them to return him his money, he not knowing how much higher he could put his case, and they being perfectly conscious of the fraud they had committed in the representations which they had made. Thereupon they at once gave him all the relief, which, had he been informed of the facts, he could have demanded as a matter of right.

Then, on this state of things, if, shortly before the winding-up, he had discovered his higher right, would it have been necessary for him to say, "I find that this cancellation was imperfect, because there was not a sufficient denunciation of your proceedings and assertion of my right, and now I must file my bill to put my higher right in force"? I cannot conceive that it was necessary for him to do so, or that anything said in *Martin's Case* (1) can be so construed. If, indeed, Mr. *Wright* had not concluded the matter by a complete and full election to put an end to the contract, and had been able, in the event of the company being successful, to turn round and deny the right of the directors to cancel his shares, it would have been different; but I think that he had fully and completely exercised his election to have the contract annulled.

Then, was this a contract that could be annulled? Was it a contract which was voidable, if not void? I think it was. The

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(1) 2 H. & M. 669. 11 Jur NS. 635.

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mind of all parties was, that the contract should be annulled; and in that the Vice-Chancellor agrees with me. The directors acted with full knowledge of the circumstances. They were glad and ready enough to annul this contract, which they had improperly entered into, and which they knew must be annulled against them if legal proceedings were taken, and with costs. Dealing with this gentleman, and being anxious to have the contract annulled, they agreed with him in a course of proceeding by which they on their part declared the allotment to be annulled, and he accepted that annulment as complete. I apprehend that from that time the directors were completely bound; they could not afterwards set up their fraud, and refuse to be bound; nor would it lie in the mouth of Mr. *Wright*, supposing the concern had become prosperous, to say afterwards that he intended to revoke the bargain, and to become a shareholder. If he was conclusively bound, the directors were conclusively bound; and as regards the shareholders, all they are entitled to, according to *Oakes* v. *Turquand* (1), is, that the *status* of any subscriber shall not be altered after the date of the winding-up. But I think that at the date of the winding-up, the contract was annulled on both sides, and that it would have been impossible for Mr. *Wright* to replace himself as a shareholder.

But then it was said that this was done just before the winding-up; and if it was done with a fraudulent desire on the part of the directors to liberate some of their friends, leaving other persons liable, that might, of course, be a matter for consideration. But this winding-up was for the purpose of going on, if I may use such an expression. It was to amalgamate one company with another, and the only mode of doing this was to put an end to one company and start in association with the other. At that time all parties thought it was a solid concern, and there is therefore nothing to induce one to say that there was fraudulent combination between the two parties to this contract.

I think, therefore, for the reasons which I have given, that the order of the Vice-Chancellor must be discharged. Mr. *Wright's* name must be struck off the list, and his costs paid out of the assets of the company.

Solicitors: Messrs. *Lewis, Munns, & Longden*; Mr. *H. Harris*.

(1) Law Rep. 2 H. L. 325.

PIKE *v.* DICKINSON.

[1870 P. 11.]

L. C.
1871
Nov. 16.

Composition Deed—Bankruptcy—Jurisdiction—Opening Account—Creditors.

The Plaintiff had made a composition with his creditors, under which he paid them 8*s*. in the pound, and was released from his debts. One of the creditors was the Defendant, who had been agent for the Plaintiff, and claimed from him a balance of £300 on which he received the composition. The Plaintiff afterwards filed the bill in this suit against the Defendant, alleging that the Defendant had made overcharges, and asking for an account and payment of the balance. Overcharges were shewn:—

Held (affirming the decision of the Master of the Rolls), that this Court had jurisdiction in the matter, and that the Plaintiff was not obliged to apply to the Court of Bankruptcy:

That the composition deed was not a bar to the suit:

That the Defendant could not set up any rights of the creditors in bar of the suit.

THE Plaintiff in this case, on the 24th of July, 1867, made a composition with his creditors, by which he agreed to pay them 8*s*. in the pound, and they released him and his estate. The composition deed was duly assented to, and registered under the *Bankruptcy Act*, 1861. The Defendant had been an agent to the Plaintiff, and told the Plaintiff that he, the Defendant, was not able to state the exact amount due to him, but believed it to be about £300; and his name was accordingly inserted by the Plaintiff in the schedule to the deed as a creditor for £300. The composition was duly paid to all the creditors, including the Defendant.

In January, 1870, the Plaintiff filed the bill in this suit against the Defendant, alleging that the accounts given by him were incorrect, and contained many overcharges, and claiming a balance due to the Plaintiff, and asking for an account. The Master of the Rolls was of opinion that overcharges were proved, and directed an account as reported (1), where the facts are more fully stated.

The Defendant appealed. It was admitted on the appeal that the accounts were inaccurate.

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(1) Law Rep. 12 Eq. 64.

Mr. *Swanston*, Q.C., Mr. *Jackson*, and the Hon. *E. Romilly*, for the Appellant:—

We say, first, that the Court of Bankruptcy is the proper Court for any application of this sort: *In re England* (1); *Stone* v. *Thomas* (2). Secondly, the composition deed is a bar to any such proceeding, as it amounts to a compromise between the Plaintiff and the Defendant; and the compromise cannot be impeached without setting aside the deed, and then the other creditors must be parties. Thirdly, it is the creditors who are entitled to anything which may be recovered in this suit; for if it should turn out that the Defendant is a debtor instead of a creditor, then the creditors executed the composition deed under a misapprehension as to the amount of the debtor's assets. Any decree must, in fact, set the deed aside, and then the creditors come in.

The *Solicitor-General* (Mr. *Jessel*), and Mr. *Robinson*, for the Plaintiff, were not called upon.

LORD HATHERLEY, L.C.:—

I do not think that I need call upon the Respondent, though I feel very strongly the necessity of watching closely a case of this kind, and of not encouraging a debtor who has made a composition with his creditors to fight them in detail afterwards.

It is, of course, a question of importance what was the true amount of the assets as compared with the debts when the deed was executed. If they differed by a large amount from what was represented, the creditors might say they were induced to execute the deed upon a representation of facts different from the truth. All the creditors are interested in this question, and have a right to see that there is no *mala fides* in the transaction. But all this only amounts to saying that the case must be closely watched.

Here the debtor is in no degree in default. It is as much the Plaintiff's case as the Defendant's that there was no accurate investigation of the accounts between them. The Plaintiff says that he did not at first know that the Defendant claimed to be a creditor, and says that the Defendant was erroneously placed in the schedule as a creditor on his own statement. But there must at the time have been some sort of account; and when the sum of £300 was fixed upon as the amount of the debt, the Plaintiff must have assumed that the Defendant had given honest and correct information as to the account. But the moment that overcharges were proved, there was—apart from the difficulty as to the composition deed—a clear case for opening the account.

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(1) Law Rep. 12 Eq. 207.

(2) Law Rep. 5 Ch. 219.

The Plaintiff alleges that the balance will turn out to be the other way, and as some items of overcharge have been shewn, a full account must be taken if the Plaintiff can maintain the suit. But two objections were raised to the suit. First, that the case was properly within the jurisdiction of the Court of Bankruptcy; and, secondly, though this was only another form of the same objection, that if the Plaintiff is right then the creditors would have a right to say that the deed should be upset, as entered into under misapprehension; for if the amount of assets proved greater than was expected, they, and not the Plaintiff, would have a right to them. And there was also a third objection suggested, that if the Plaintiff were compelled, on taking the accounts, to pay this creditor in full, this would be an unfair advantage as against the other creditors.

As to the first objection, this Court would not stay its hand, unless it was satisfied that the Court of Bankruptcy had complete jurisdiction. Mr. *Swanston* pressed me with the case of *Stone* v. *Thomas* (1), as shewing that the application should, in the first place, be made to the Court of Bankruptcy, to see if that Court could not do complete justice. But if it is clear that the Court of Bankruptcy has not jurisdiction, it is useless to send the parties there. Here it is not a trustee who is seeking to recover, but the debtor who claims the whole of the assets, subject to payment of the composition, which has been duly made. If it turns out that one creditor had brought in a false claim, can the Court of Bankruptcy do full justice? The utmost it could do would be to order repayment by the Defendant of the amount paid to him; and it could not order payment of anything found due from him on his account. Nor does it follow that any other creditor would think fit to take proceedings in the matter.

I do not wish to curtail or interfere with the jurisdiction of the

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(1) Law Rep. 5 Ch. 219.

Court of Bankruptcy; but it, being a Court adapted for a special purpose, may not have the machinery for dealing in the best manner possible with every case.

As to the claims of the other creditors, I do not see what right this wrong-doer has to interpose the other creditors as difficulties in the way of having justice done to the Plaintiff.

If it should turn out that, after the costs of the litigation have been paid, there is any surplus coming to the debtor, and if the other creditors then feel disposed to take proceedings, they can adopt their own course, though I do not wish to say anything to encourage the attempt.

Solicitors for the Plaintiff: Messrs. *Simpson & Cullingford.*

Solicitor for the Defendant: Mr. *Rowland Miller.*

L. C.
1871
Nov. 16.

PRIDE *v.* BUBB.

[1870 P. 11.]

Married Woman—Power to Contract—Real Estate—Acknowledged Deed not in Form a Disposition by Wife—Reversion—3 & 4 *Will.* 4, *c.* 74, *s.* 77.

Ch. D. 196

By a deed of separation made between a husband and a wife and trustees, and duly acknowledged by the wife, it was agreed that the wife should hold all the real and personal estate of the husband and wife, or either of them in right of the wife, as her separate property, and should have power, by will, to devise or bequeath the same. The husband then purported to convey to a trustee all such real and personal estate, to be held upon corresponding trusts:—

Held, that though the wife did not expressly convey real estate vested in her, it was the intention of the deed that she should have power to dispose thereof as if she was unmarried, and accordingly that a certain estate of which a trustee was seised in trust for her separate use during her life, with remainder to herself in fee, passed by her will.

A married woman may pass her separate real estate by deed or will as a *feme sole*.

Decree of the Master of the Rolls affirmed.

UNDER the wills of *Richard Hill* and *Sarah Hill*, who had, under *Richard Hill's* will, powers of appointment, certain real estate in *Gloucestershire* was vested in trustees upon trust to pay the rents to

Margaret Welch, wife of *William Welch,* for her life to her separate use; and upon trust as to the remainder or reversion for *Margaret Welch* in fee, subject as to part to an estate tail in her daughter, who died in 1869, without issue. A deed of separation, dated the 30th of May, 1846, was made between *W. Welch,* of the first part, *Margaret Welch,* of the second part, *Henry Jones,* of the third part, and *John Andrews,* of the fourth part; and thereby, after reciting that in consequence of unhappy differences between the said *William Welch* and *Margaret,* his wife, it was lately agreed that they should live separate and apart from each other, and that certain lands should be demised as therein mentioned; and also that the said *Margaret Welch,* her heirs, executors, administrators, and assigns should have, hold, use, occupy, possess, and enjoy, and receive and retain all and singular the real and personal estate, property, and effects whatsoever of, in, and to which, or in respect whereof, the said *William Welch,* as the husband of the said *Margaret Welch,* or the said *William Welch* and *Margaret,* his wife, or either of them, in her right, were, or at any time or times should or might be or become, in any manner whatsoever, seised, possessed, interested, or entitled, and the rents, issues, and profits thereof respectively (subject, nevertheless, as to the hereditaments demised by the said indenture of lease to the term and estate thereby created), and all clothes, wearing apparel, ornaments, household furniture, chattels, and moneys whatsoever, then or thereafter in her possession, for the sole and separate use and benefit of the said *Margaret Welch,* her heirs, executors, administrators, and assigns, exclusively and independently of her said husband, and in all respects free from his debts, liabilities, engagements, control, and interference. And after other recitals, it was witnessed that *William Welch* covenanted that *Margaret Welch* might thereafter live separate and apart from him as therein mentioned; and also that (subject, nevertheless, as to the hereditaments thereinafter charged with the payment of an annuity of £40, to the charge and power of distress thereinafter in that behalf contained, and as to the hereditaments demised by the said indenture of lease, to the term and estate thereby created), he, the said *William Welch,* his heirs, executors, and administrators would permit the said *Margaret Welch,* her heirs, executors, administrators, and assigns to have,

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hold, occupy, use, possess, and enjoy, to and for her and their own separate use, and as her and their own separate property, and without being subject to the control, debts, interference, dispositions, or engagements of the said *William Welch*, his heirs, executors, or administrators; and either by any deed or deeds, or by her last will and testament in writing, or any writings in the nature of a will, or any codicil thereto to sell, give, devise, bequeath, or in any manner whatsoever dispose of all and singular the real and personal estate, property, and effects whatsoever of, in, or to which or in respect whereof the said *William Welch*, as the husband of the said *Margaret Welch*, or the said *William Welch* and *Margaret*, his wife, or either of them in her right, was or were, or at any time or times should or might be or become, in any manner whatsoever, seised, possessed, interested, or entitled; and also permit and suffer the said *Margaret Welch*, her heirs, executors, administrators and assigns, to receive and retain, to and for her and their own separate use, and as her and their own separate property, or expend without being subject to the control, debts, interference, dispositions, or engagements of the said *William Welch*, his heirs, executors, or administrators, all the rents, issues, and profits of all and singular such real estate, property, and effects whatsoever, as aforesaid. And it was further witnessed that the said *William Welch* and *Margaret Welch* did, and each of them did, thereby charge all the hereditaments whatsoever which were respectively devised and appointed by the will of the said *Sarah Hill* (except the said lands demised as aforesaid) with the payment to the said *John Andrews* and *Edward Bloxsome*, their executors, administrators, and assigns, during the life of the said *William Welch*, and in trust for him, the said *William Welch*, of an annuity or clear yearly sum of £40 by equal half-yearly payments; and provisions were made for securing the due payment of the annuity. And it was further witnessed that he, the said *William Welch*, did grant, bargain, sell, release, assign, transfer, set over, and confirm unto the said *Henry Jones*, his heirs, executors, administrators, and assigns, all and singular the real and personal estate, property, and effects whatsoever, of, in, or to which, or in respect whereof the said *William Welch*, as the husband of the said *Margaret Welch*, or the said *William Welch* and *Margaret*, his wife, or either of them in her right were or was or at any time or times should or might be or become in any manner whatsoever seised, possessed, interested, or entitled (except the said hereditaments demised as aforesaid, and except such part of the said personal estate as had come to the actual possession of the said *William Welch*), and also all the rents, issues, and profits of all and singular such real and personal estate, property, and effects whatsoever, as aforesaid, except as aforesaid, and also all and singular the personal estate of the said *Margaret Welch*, To have and to hold the premises unto and to the use of the said *Henry Jones*, his heirs, executors, and assigns, according to the nature thereof respectively (subject nevertheless as to the hereditaments thereinbefore charged with the payment of the said annuity of £40 to the same, and subject as to all the property to a provision thereinafter contained for the indemnity of the said *Henry Jones*, his heirs, executors, administrators and assigns, against the debts of *Margaret Welch*), in trust to permit and suffer the said *Margaret Welch*, her heirs, executors, administrators, and assigns, to have, hold, receive, retain, use, enjoy, sell, give, devise, bequeath, dispose of, and expend the same to and for her and their own sole and separate use and benefit, exclusively and independently of the said *William Welch*, his heirs, executors, and administrators, and altogether free from his or their control, disposition, debts, interference, or engagements, as if she were unmarried and entitled to the same absolutely. The deed contained many other provisions, but nowhere contained an express conveyance of real estate by *Margaret Welch*.

This deed was executed by all the parties, and was duly acknowledged by *Margaret Welch* before Commissioners.

Margaret Welch and her husband continued to live apart until her death in 1857. By her will, purporting to be made in execution of the powers given to her by the deed of separation, she devised all her estate, real and personal, to *Henry Jones*, subject to the payment of some legacies.

William Welch had died in 1853.

Henry Jones, on the death of *Margaret Welch*, entered into possession of the real estate which had passed under the wills of *Richard Hill* and *Sarah Hill*, and he having died his devisees continued in possession.

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The Plaintiffs were the co-heirs of *Margaret Welch*, and also of *Richard Hill*, and in March, 1869, filed the bill in this suit against the devisees of *Henry Jones*, and against the heirs or devisees of the trustees of *Richard Hill's* will and *Sarah Hill's* will, praying that the trusts of the wills of *Richard Hill* and *Sarah Hill* might be carried into execution, and that the trustees of the wills of *Richard Hill* and *Sarah Hill* might be declared trustees for the Plaintiffs, with consequent relief.

Lord *Romilly*, M.R., was of opinion that the intention of the parties was clear, and that the deed of separation gave to Mrs. *Welch* full power of disposing by will of the equitable reversion in fee simple expectant on the life estate which was given to her for her separate use; and his Lordship dismissed the bill with costs.

The Plaintiffs appealed.

The *Solicitor-General* (Mr. *Jessel*), Sir *Roundell Palmer*, Q.C., and Mr. *G. W. Collins*, for the Appellants:—

If the husband alone had power to alter the descent of the real estate, no doubt he has done so; but he had not power alone, and she, either by mistake or purposely, has not conveyed the estate as required by 3 & 4 Will. 4, c. 74, s. 77. *Crofts* v. *Middleton* (1) has no bearing on the question. Whatever could have been done by fine and recovery can be done by a deed acknowledged and inrolled, but that is all; and a fine and recovery to the uses of this deed would not have given this married woman power of disposition by will: *Dillon* v. *Grace* (2). Moreover this deed does not include separate estate: *Ramsden* v. *Smith* (3). As far as the married woman is concerned, the deed amounts to a contract only. Before the Act, a married woman could not contract as to her real estate, nor can she now, for she only takes power under the 77th section of 3 & 4 Will. 4, c. 74, which says nothing about a contract. The words "dispose of" cannot mean "contract." If a married woman was to be enabled to contract, why were copyholds excluded? As to the recitals, they are only of a past agreement, and, moreover, must be controlled by what follows.

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(1) 2 K. & J. 194; 8 D. M. & G. 192; 2 Jur. (N. S.) 528.

(2) 2 Sch. & Lef. 456.

(3) 2 Drew. 298.

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Mr. *Southgate*. Q.C., for a Defendant, took no part in the argument.

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, for the principal Defendants, were not called upon.

LORD HATHERLEY, L.C.:—

It cannot, I apprehend, be now disputed that when a woman is the owner of real estate to her separate use, she is to all intents and purposes in the position of a *feme sole*, so as to be able to dispose of that estate by will or deed.

I think there were doubts existing in some part of the profession as to how far the doctrine with reference to the separate property of a married woman could be held to extend to a case where the heir was to be affected by any instrument, unless it was by some duly acknowledged conveyance in which the husband and wife had concurred, and how far the provisions, which were made simply for securing the wife against the interference of the husband, were or were not to be considered as provisions giving her power to dispose of the property as against her heir. These doubts have, however, been put an end to by decision.

Now the object of this deed is clearly to place this lady, with reference to all her real property whatsoever and whensoever acquired, in exactly the same position as if she had no husband at all; in other words, to give her the whole of the property to her separate use. If that had been so limited by a deed made anterior to her marriage, nobody disputes that the case would come precisely within the doctrine laid down by Lord *Westbury* (1), that she would hold as a *feme sole* and be able to make a will, the husband being placed out of the way. And I apprehend that by a deed duly executed, in which her husband concurred, the whole of her property might be placed in that position without any actual conveyance or assignment, and simply by the agreement of the husband, who is the only person concerned in the matter.

In this deed it is recited that for valuable consideration the husband had agreed with his wife to abandon all authority over her property, and to give her full power of disposition over it as if she were

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(1) *Taylor* v. *Meads*, 34 L. J. (Ch.) 203. 11 Jur. N.S. 166
4 De G. J. & S. 597.

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sole. Then he covenants, and she makes a declaration to the same effect; and as both present and future property was to be included, it is impossible to hold that this reversion expectant on her life estate is not to be considered as within the meaning of the deed. I am quite satisfied that the observations in *Crofts* v. *Middleton* (1), with reference to the statute which enables the husband and wife to deal with her estate as they think fit, were intended to displace the notions which I had expressed as to the effect of a mere contract.

It seems to me that the lady has, by purchase, acquired to herself this right; and that the right having been once acquired, the husband is put out of the question altogether. And as regards any doubt as to the position of her future property, that doubt is solved when once it is determined that any woman holding an estate by gift to her separate use, although otherwise not able to bar the right of her heir, is put in a position in which she can deal with it unfettered by a marriage contract, and as any other person could deal with it.

I think the decision of the Master of the Rolls must be upheld as being right in principle, and that the appeal must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *Gabriel.*
Solicitors for the Defendants: Messrs. *White & Sons.*

(1) 8 D. M. & G. 192, 212: 2 Jur NS. 573.

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[1871 G. 97.]

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Dec. 6.

Demurrer—Execution of Deed—Creditors' Deed—Voluntary Deed—Right of Trustee to Sue.

A bill stated that, by an indenture made between *A.*, of the first part, *B.*, of the second part, and the several other persons whose names and seals were, or were intended to be, thereunto subscribed as creditors of *A.*, of the third part, *A.* assigned all his personal estate to *B.* upon trusts for the creditors of *A.*:—

Held, on demurrer (affirming the decision of the Master of the Rolls), that this was not an averment of the execution of the deed by any of the creditors:

Held, that the deed nevertheless would operate as an assignment of the personal estate, so as to enable *B.* to maintain a suit against a trustee to whom certain personal estate had been assigned in trust for *A.*; and that the creditors need not be parties to the suit.

Decision of the Master of the Rolls reversed.

Garrard v. *Lord Lauderdale* (1) discussed.

THE bill in this case was filed by *J. Glegg* against *W. H. Rees*, and alleged that in 1859 a certain messuage at *Brixton* was assigned to the Defendant as a trustee for *W. Roupell;* and the bill stated that "the said *W. Roupell* has been convicted of felony; but previously to such conviction, and by an indenture dated the 19th day of September, 1862, and made between the said *William Roupell*, of the first part, the Plaintiff, of the second part, and the several other persons whose names and seals were, or were intended to be, thereunto subscribed and set (being respectively creditors of the said *William Roupell*), of the third part, the said *William Roupell* assigned all his personal estate and effects to the Plaintiff, upon the trusts therein mentioned in favour of the creditors of the said *William Roupell*. The said indenture was duly executed by the said *William Roupell* and the Plaintiff, and registered under the 194th section of the *Bankruptcy Act*, 1861; and the Plaintiff charges that the equitable estate of the said *William Roupell* in the said leasehold messuage and premises at *Brixton Hill* aforesaid became, upon the execution of the said indenture, and now is, vested in the Plaintiff upon the trusts of the said indenture."

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(1) 2 Russ. & My. 451.

And the bill prayed a declaration that the Defendant was a trustee of the messuage in question for the Plaintiff, and might be ordered to assign it to him.

To this bill the Defendant demurred for want of equity, and for want of parties; and the Master of the Rolls allowed the demurrer (1).

The Plaintiff appealed.

The *Solicitor-General* (Mr. *Jessel*), and Mr. *C. Walker*, for the Appellant:—

We contend that the allegations in the bill as to the execution of the deed by the creditors are sufficient. If a deed is averred to be made, that involves execution: *Cabell* v. *Vaughan* (2). The signature of the creditors will be presumed: *Rist* v. *Hobson* (3). As the deed is registered, it cannot be revoked as voluntary: *Smith*

(1) July 4.

Lord Romilly, M.R., said he was of opinion that there was no sufficient averment that any creditor had executed this deed. No doubt, in general, the averment that an indenture was made between *A.*, *B.*, and *C.* is a sufficient averment that they all executed the indenture; but an averment that a deed is made between *A.* and *B.* and *C.* whose name was intended to be subscribed, is no averment of an execution by *C.*, as to which the averment was ambiguous; and that was the case here. If, however, it should appear that the deed was really executed by the creditors, leave to amend would be given.

But there was the further question for whom the Plaintiff was trustee. Putting the Crown out of the question, the Plaintiff was trustee for either *Roupell* or the creditors. If *Garrard* v. *Lord Lauderdale* (2 Russ. & My. 451), was correct, the Plaintiff was trustee for *Roupell* only, and not for the creditors, in which case it was a question whether he would be entitled to sue the Defendant, who was a trustee for either *Roupell* or the Crown.

As to whether the deed was valid as registered under the *Bankruptcy Act*, his Lordship reserved his judgment.

July 12.

His Lordship expressed his opinion that the case did not turn upon the question whether deeds registered under sect. 194 of the *Bankruptcy Act*, 1861, could be enforced under the 197th section, which would be difficult to decide; for his Lordship thought that the lapse of time since the deed was executed was a complete bar to its being treated as an act of bankruptcy, and left it a voluntary deed, subject to all the rules of a Court of Equity. His Lordship allowed the demurrer, and refused leave to amend.

(2) 1 Wms. Saund. 291.

(3) 1 S. & S. 543.

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v. *Hurst* (1). At all events, the Plaintiff has sufficient interest to enable him to maintain this suit, and to recover the property assigned to him.

Mr. *Fooks*, Q.C., and Mr. *Holmes*, in support of the demurrer, denied that there was any allegation of the execution by the creditors; in fact, the inference was the other way, because it was alleged that *Roupell* and the Plaintiff had executed it. The deed was, therefore, voluntary and revocable: *Garrard* v. *Lord Lauderdale* (2); *Wallwyn* v. *Coutts* (3); *Ellison* v. *Ellison* (4). The deed being, therefore, revocable, the Plaintiff could not sue without making his *cestuis que trust* parties.

Dec. 6. LORD HATHERLEY, L.C. :—

The question raised on this demurrer depends upon a very short point.

The bill alleges that the Defendant is in possession of certain property, which he holds or did hold as trustee for *William Roupell,* who was convicted of felony; that *Roupell,* before this conviction, executed a deed, by which he conveyed all his personal estate to the Plaintiff, in trust for the creditors of *Roupell;* that the deed was executed by *Roupell* and the Plaintiff, and was registered. There is also an averment that the equitable estate of *Roupell* became, upon the execution of the deed, and now is, vested in the Plaintiff. Upon these averments the Master of the Rolls came to the conclusion, in which I agree, that there is no reason to presume the execution of the deed by any creditors as parties of the third part, although the bill does allege that the deed was registered under the *Bankruptcy Act,* and that the property of *Roupell* became vested in the Plaintiff as trustee. The allegation as to vesting would have no special effect beyond the statement of the terms of the deed, and would merely contradict any subsequent revocation of the deed, or that the deed had been set aside by any proceedings in bankruptcy or otherwise.

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(1) 10 Hare, 30, 47. 17 Jur 30
(2) 3 Sim. 1; 2 Russ. & My. 451.
(3) 3 Mer. 707.
(4) 6 Ves. 656; 1 Wh. & T. L. C. 3rd Ed. 223.

The whole effect of the deed as stated is such that I must assume that the personal estate of *Roupell* passed to the Plaintiff in trust, for the creditors. The case of *Garrard* v. *Lord Lauderdale* (1) has no application to this case. There the declaration of trust was held to be simply for the benefit of the assignor; and those who sought to take any benefit from the deed as a deed of trust for them were unable to do so. It seemed a deed for the benefit of creditors; yet when looked at it was no such thing, but merely an arrangement for the convenience of the assignor and assignee, the assignee undertaking the agency of the affairs of the assignor.

The authority of *Garrard* v. *Lord Lauderdale* has been questioned by Lord *St. Leonards* in *Simmonds* v. *Palles* (2), upon the facts. But upon principle there can be no doubt that, if the transaction is simply between the assignor and the assignee, no creditor can take advantage of the deed unless it has been communicated to him.

I will assume, however, that the deed is strictly within the principle of *Garrard* v. *Lord Lauderdale*, but still it is an assignment and vested the estate in the Plaintiff as assignee for the purpose which the assignor had in view. That being so, there is no possible reason why the Plaintiff should not sue any person who holds any part of the property which has been assigned. The cases relating to voluntary settlements do not apply here. The principles were discussed in *Sloane* v. *Cadogan* (3), and it was clearly laid down in *Kekewich* v. *Manning* (4) and other cases, that a contract for a voluntary settlement cannot be enforced against the settlor. But if a voluntary settlor, for purposes of his own, wishes to part with his property, he can do so, and his purpose can be carried into effect by the assignee taking proceedings against any person in possession of the property. Why should not the assignee, as against third parties, perform the simple duties intrusted to him by the deed? As regards third parties, he may proceed against them, though not against the assignor, who may have changed his mind, and be able to avoid the arrangement.

This deed has vested in the Plaintiff such an interest as entitles

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(1) 3 Sim. 1; 2 Russ. & My. 451.

(2) 2 J. & Lat. 489, 495.

(3) Sug. V. & P. 11th Ed. App. No. 24.

(4) 1 D. M. & G. 176.

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him to call upon the Defendant for an answer. The Plaintiff does not sue as a creditor, and does not say that there were any debts; but even without debts, there would be a resulting trust for *Roupell* or the Crown, and the Plaintiff has a right to recover the property from wrong-doers.

There was also a demurrer for want of parties; but I think that the statute which enables trustees to sue third persons, without making their *cestuis que trust* parties, applies to that objection, If the case ever comes to a hearing, the Court will, no doubt, take care that those who are interested in *Roupell's* estate shall have sufficient notice. The bill does not seek administration of the estate, but merely to get in the property for the benefit of the *cestuis que trust,* whoever they may be.

The order of the Master of the Rolls must be reversed, and the demurrer overruled, with costs. No costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Woodrooffe & Plaskitt.*
Solicitor for the Defendant: Mr. *H. Earle.*

HUNTER *v.* WALTERS.

[1865 H. 318.]

CURLING *v.* WALTERS.

[1866 C. 23.]

DARNELL *v.* HUNTER.

[1866 D. 157]

L. C.
and L. JJ.
1871
Nov. 15, 16, 22.

Mortgagees—Priority—Execution of Deed—Signing Receipt—Fraud—Notice—Defects in Plans—Attestation.

The solicitor of two mortgagees put up for sale by auction, without any authority, the mortgaged estate. He professed to have bought the estate, and prepared a conveyance which purported to be made by the second mortgagee under his power of sale. The mortgagees both executed the conveyance, and also signed indorsed receipts for money as paid to them, though no money was in fact paid to them. The solicitor took possession of the estate and continued to pay the interest to the mortgagees, and afterwards made an equitable mortgage of the estate, representing it to be his own and unincumbered. As to the first mortgagee, there was evidence that he was deceived by the solicitor;

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5 PC 259
18 Eq 230
10 Ch 28
20 Eq 255
7 HL Ca 502-3
15 CLD 642
9 ALD 210

as to the second mortgagee, there was evidence that he trusted the solicitor implicitly. There were inconsistencies on the plans upon the different deeds, and the solicitor had attested some of the prior deeds:—

Held (affirming the decree of *Malins*, V.C.), that, under the circumstances, the equitable mortgagee had priority over the second mortgagee:

Held, that the inconsistencies in the plans and the attestation by the solicitor did not put the equitable mortgagee on inquiry so as to fix him with constructive notice.

IN May, 1835, *J. Brandling* and *R. W. Brandling*, the then owners in fee of an estate consisting of seventy-five acres, and called the *Felling* estate, mortgaged it to *George Burdon* for £7200. In September, 1838, *John Brandling* covenanted to convey the *Felling* estate to *R. W. Brandling*, on payment by him of the £7200 and interest, the estate in fact belonging to *R. W. Brandling*. In October, 1838, 1A. 2R. 24P., part of the estate, was conveyed by *Burdon* to *J. Brandling* and *R. W. Brandling*, free from the mortgage debt.

By an indenture, dated the 26th of December, 1838, the mortgage to *Burdon* was transferred to a Mrs. *Hunter*, and the deeds were put in the possession of *Ralph Walters*, Mrs. *Hunter's* solicitor. In January, 1839, a second mortgage, being for £2000, was made by *R. W. Brandling* and *J. Brandling* to *W. N. Darnell*, another client of *Walters*, the power of redemption being given to *R. W. Brandling*. *Walters* attested the execution by the mortgagors of this deed. In 1840 about four acres of the estate was conveyed to *R. W. Brandling* discharged from the mortgages. The conveyances of this piece, and of the other small piece, were made in order to enable *R. W. Brandling* to dispose of the land for building purposes, and were both attested by *Walters*. In 1840 the two small pieces of land were equitably mortgaged to *W. N. Darnell* by way of further security, and the memorandum of mortgage was attested by *Walters*. In 1846 *R. W. Brandling* assigned his estate to trustees for the benefit of his creditors; and on the 30th of October, 1852, the trustees conveyed to *Darnell* the two small pieces of land, with the exception of certain parts thereof which had been sold for building.

In 1853 *Walters*, acting without any authority, put up the *Felling* estate, except the two pieces conveyed away, together with eight acres of leasehold land of his own, for sale by auction. The only particulars of sale were some which had been used on an attempted sale in 1844, and in the particulars the name of *Walters* appeared as a solicitor concerned. At this pretended auction the property was knocked down for £9050 to one *Dove*, from whom *Walters* professed to buy it at an advance of £150. An indenture was then prepared by *Walters*, and made to bear date the 1st of June, 1853, and the parties to it were *William Hunter* the executor and devisee of Mrs. *Hunter*, *W. N. Darnell*, *Dove*, and *Walters*. The indenture recited the two mortgages and the sale as made by *Darnell* under the power of sale in his mortgage deed; and all parties concurred in the usual manner in conveying to *Walters* the whole *Felling* estate, as described in the deed of 1835, the sum expressed to be paid to *W. Hunter* being £7200, that to *Darnell* £1850, and that to *Dove* £150. *W. Hunter*, *W. N. Darnell*, and *Dove*, all executed the deed, and on it were indorsed receipts in the usual forms for the £7200, the £1850, and the £150, signed by *Hunter*, *Darnell*, and *Dove* respectively. No money was, in fact, paid to any of them by *Walters*. He took possession of the estate, and, until his death in 1865, paid interest to *Hunter* and *Darnell*, as if they still had charges on the estate.

But in 1862 *Walters* had applied to Mr. *Tatham*, a solicitor, partner in the firm of Messrs *Fyson & Co.*, for a loan of £5000 on the security of the *Felling* estate, representing himself to be the absolute owner thereof. *Tatham* accordingly agreed to advance £5000, money belonging to a client, *W. Curling*. *Tatham* examined the title deeds, and made inquiries as to the value, and ultimately advanced the £5000 to *Walters* on the security of an indenture, dated the 11th of March, 1862, and made between *Walters*, of the one part, and *Curling*, of the other part, whereby *Walters* covenanted that the deeds mentioned in the schedule thereto should be a security for the repayment of the £5000 and interest, and that *Walters* and all necessary parties would convey to *Curling* all the pieces of land and hereditaments comprised in the deeds and delineated on the annexed plan, by way of mortgage for securing the payment of the £5000 and interest; and that in the meantime the said hereditaments should remain charged with the payment of the £5000 and interest.

The schedule comprised the deeds of 1835, 1838, 1839, 1846, 1852, and 1853, but not the two conveyances of the small pieces of land, nor the lease of the leaseholds which belonged to *Walters*; and the plan annexed was a copy of that annexed to the particulars of sale in 1844, the small pieces of land which had been conveyed to *R. W. Brandling* being excluded, but the leasehold being included.

The deeds were delivered to Messrs. *Fyson & Co.*, solicitors to Mr. *Curling*, and *Walters* paid interest on the £5000 until his death in 1865, when the fraud was discovered.

Thereupon three suits were instituted—one by *W. Hunter*, one by the executors of *Darnell*, who was dead, and one by Mrs. *Curling*, the executrix of *Curling*; Mrs. *Curling* claiming priority over *Hunter* and *Darnell*, and *Hunter* and *Darnell* claiming priority over Mrs. *Curling*.

As to the execution of the deed of 1853, *W. Hunter* stated that he had received a letter from *Walters*, dated the 31st of January, 1853, saying: "The *Felling* property has been sold, and you will have to take this as notice to receive your principal and interest in six months from the 20th instant. It is possible the purchaser might retain the mortgage if you consented to take 4 per cent., but in the present state of the money market he will probably try to get it at 3½. I have made an offer to the purchaser to take the purchase off his hands at a given sum. Are you inclined to join in the speculation? I told you the particulars when we last met. I think it will pay in time, but I do not expect a quick return." *W. Hunter* further deposed that he understood that the mortgage was not to be paid off, and that he had signed the deed at *Walters*' request, who stated that it was a mere form, and had been executed by *Darnell*, that he never read the deed, and that he believed that the deed merely transferred the interest of the mortgagor to *Walters*, leaving the security as it was before.

Mr. *Darnell* was dead, and there was no evidence as to the manner in which he was induced to execute the deed of 1853. There was, however, evidence that he had great confidence in *Walters*, and was in the habit of executing deeds brought to him by *Walters* for execution.

Tatham stated that he found on the deeds a good title, and had no reason to suppose that *Walters* was not the unincumbered

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owner of the *Felling* estate, and that, in his opinion, the plans of the estate corresponded, deduction being made for small portions which had been sold, and allowance for discrepancies which were apparently clerical errors.

The Vice-Chancellor *Malins* held that *Curling's* executrix had priority over *Hunter* and over *Darnell's* executors, and made a decree accordingly, as reported (1), where the evidence of *Hunter* and of *Tatham* is more fully stated.

Darnell's executors appealed, but before the appeal was heard *Hunter* had bought up *Curling's* charge; and *Hunter* and Mrs. *Curling* now appeared by the same solicitor.

Mr. *Glasse*, Q.C., and Mr. *Rigby*, for the Appellants :—

We contend that under the circumstances, the deed of 1853 is not to be considered as *Darnell's* deed at all. He thought it a different deed, and did not know what he was signing. In such a state of things his signature is useless: *Vorley* v. *Cooke* (2), *Lee* v. *Angas* (3), and *Ogilvie* v. *Jeaffreson* (4). At law such a deed

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(1) Law Rep. 11 Eq. 292.

(2) 1 Giff. 230.

(3) 1866. Nov. 20. V.-C. STUART.

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WILLIAM LEE, by his will, charged his estate with an annuity in favour of his wife, and after her death he gave his estate to his two daughters, as tenants in common. The widow and elder daughter, *H. Lee*, in 1842 and 1844, mortgaged their annuity and moiety for £1500. In December, 1857, *E. D. Conyers*, a solicitor, who had acted for the *Lees*, wrote to the younger daughter, *S. Lee*, stating that it was necessary to raise money on the estate to pay off the old mortgage, which, he alleged, was called in, and that as he could not apply to her elder sister (who had married and gone abroad), he must have the deed signed by her, and he invited *S. Lee*, then residing at *Edinburgh*, to meet him at *York*, and he then told her that she would not be in any way liable, as it was merely a renewal. The deed was not read over, nor further explained to her. *S. Lee* accordingly executed the deed, which purported to be a mortgage of her moiety and of her mother's annuity, to a Mr. *Angas* for £2000, and she signed the indorsed receipt. Mrs. *Lee's* signature to the deed was a forgery. It was alleged that *Conyers*, who was *Angas's* solicitor, received the money, and applied it for his own purposes. After the death of *Conyers*, the fraud and forgery were discovered, and this bill was filed by Mrs. *Lee* and Miss *S. Lee*, to have the deed of December, 1857, declared void, and cancelled.

Mr. *Malins*, Q.C., and Mr. *Fry*, for the Plaintiffs.

Mr. *Cole*, Q.C., and Mr. *E. E. Kay*, for the Defendants.

(4) 2 Giff. 353.

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would be inoperative: *Foster* v. *Mackinnon* (1). *Barnard* v. *Hunter* (2) is exactly in point. It is clear that the deed is void, and that *Hunter* was deceived; if a man does not know what he is signing, his signature goes for nothing: *Cockell* v. *Taylor* (3); *Jones* v. *Thomas* (4). The mere execution of a deed is not conclusive on the person executing it, and if he has been defrauded in the matter equity will relieve him: *Beckett* v. *Cordley* (5); *Rice* v. *Rice* (6). *Walters* was the solicitor of *Darnell*, who was justified in leaving the business in the hands of *Walters*. In all such cases relief has been given: *Thorpe* v. *Holdsworth* (7); *Newton* v. *Newton* (8); *Eyre* v. *Burmester* (9); and *Cory* v. *Eyre* (10).

Moreover, what took place when *Curling* advanced his money was enough to have put his solicitor on his guard, and to have led him to make inquiries which would have disclosed the fraud. If he had compared the plans, he would have found a difference, and then he would have discovered that those lots had been sold, and that *Walters* was concerned as the solicitor. The whole fraud would then have been discovered: *Kennedy* v. *Green* (11). He would have seen that *Darnell* did not sell the building lots under his power of sale. The irregularities and imperfections in the deeds and plans ought to have created suspicion. If the deeds had been laid before counsel it would all have been found out. If *Curling's* solicitors had inquired into the circumstances of the sale they would have found out that it was conducted by *Walters*, and was a mere sham. At all events, we have a charge on the building lots, as they were not within *Darnell's* power of sale, and did not pass by the mortgage of 1862.

Sir John Stuart, V.C., said it was clear that Mrs. *Lee's* signature was a forgery, and therefore as to her the deed must be set aside. After going through the evidence, His Honour said that Miss *S. Lee's* signature was procured by false representations, and therefore there must be a decree that the deed as to her also must be set aside, and the Defendants pay the costs of the suit.

The Defendants appealed, and the appeal was dismissed with costs by the Lords Justices on the 17th of March, 1868.

(1) Law Rep. 4 C. P. 704.
(2) 2 Jur. (N.S.) 1213.
(3) 15 Beav. 103.
(4) 11 W. R. 50.
(5) 1 Bro. C. C. 352.
(6) 2 Drew. 73.
(7) Law Rep. 7 Eq. 139.
(8) Law Rep. 4 Ch. 143.
(9) 10 H. L. C. 90.
(10) 1 D. J. & S. 149.
(11) 3 My. & K. 699.

Sir *Roundell Palmer*, Q.C., and Mr. *V. Hawkins*, for *Curling's* executrix; and

Mr. *Cotton*, Q.C., and Mr. *Fischer*, for *Hunter*, were not called upon.

LORD HATHERLEY, L.C.:—

This case now depends upon an extremely short question, namely, whether the mortgage given by *Walters* to *Curling* is an effectual security. Mr. *Curling* undoubtedly had not the slightest notice of any interest in any one except *Walters*, unless some constructive notice can be traced. [His Lordship then stated the facts of the case, observing that unfortunately it was extremely bare of evidence as to the execution of the deed by *Hunter*, and that as to *Darnell's* execution there was no evidence at all.] It is first said that we ought to regard the whole of these instruments as void, upon the principle of certain cases, such as *Kennedy* v. *Green* (1), where a representation has been made to a party to a deed that the instrument he is about to execute is an instrument of a totally different description from anything which it turns out to be. In such cases the person executing the instrument has not had his mind applied in any way to the words therein contained, but to a different state of things; for instance, when a person has signed a document, believing it to be a certificate, whilst it is, in fact, a bond. In the early books we find Lord *Coke* saying that if a man is blind or illiterate, and an instrument is read over to him falsely, then the instrument is void (2). This is a proposition which one would not be inclined to dispute when broadly laid down; and I do not wish to go into the shades of difference between the cases cited before us, some of which might stand upon very different principles. There are two cases, I think, before the Vice-Chancellor *Stuart*, where mortgages were fraudulently obtained, and could, therefore, when transferred, not stand as a security for more than was due. But I think that all those cases are so entirely beside the present case, that I do not wish to make any further observations upon them. The case of *Jones* v. *Thomas* (3) has nothing to do with the question whether a man can part with

(1) 3 My. & K. 699. (2) 2 Rep. 2 b, 9 a. (3) 11 W. R. 50.

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his interest by signing an instrument of which he does not know the effect.

I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money—a document which, as the Vice-Chancellor observes, could not be mistaken—he cannot affect not to know what he was doing, and it is not enough for him afterwards to say that he thought it was only a form. That merely amounts to saying that a misrepresentation was made to him, under which he executed a deed; still the deed may have been exactly what he intended to execute, though he intended it to be used for a totally different purpose. But this does not affect the deed. The fraud of the person who used the deed for a different purpose does not make it less the deed of the person who executed it.

We have not in this case any evidence to bring it within the authorities which shew that an instrument executed under certain circumstances of misrepresentation may be altogether void. [His Lordship then commented on the letter written by *Walters* to *Hunter*, and said that perhaps *Hunter* might have merely trusted *Walters* and have been defrauded by him.]

As regards the minor matters in this case, we were told that Mr. *Curling*, or his solicitor, Mr. *Tatham*, was guilty of considerable negligence, which should deprive Mr. *Curling* of any advantages he might otherwise have obtained against the former mortgagees. First, it was said that they would have found, if they had compared the maps, discrepancies and defects in title to some of the properties, and would have found that there was more property than was comprised in their deed. I think the answer to that contention is, that they took a security upon whatever was in their deed and nothing else; and therefore, if they were not to have a security upon anything else, they need not trouble themselves about it; they did not inquire what had become of the other land, because it was no matter of theirs. As regards the few acres which were surplus, it seems to me doubtful whether the title deeds relating to that were included in those title deeds which had been laid before Mr. *Tatham*, but whatever is comprised in the title deeds, I take it they must have security upon; and as regards any minor pieces which are comprised in their deeds, but as to which the anterior title has not been produced, they must take such title as they can get.

There is no such extravagant doctrine as that which has been contended for, that if a man, who is purchasing or taking a mortgage over a large estate as to which the title is furnished to him, chooses, as to a small portion, to be content with a short title, then as to all the rest of the estate he is to be affected with notice of something which he might have found out if he had investigated the earlier title to the small portion. That would be carrying the doctrine of constructive notice to a greater length than it has yet been carried.

It was also suggested that, if they had looked back to the deeds, they would have found Mr. *Walters,* the solicitor, attesting several of the deeds, but the attesting by no means shews that he was the solicitor; and, in the next place, it has never been the doctrine of this Court that you are obliged to look at the name of the attesting witness in such transactions to ascertain all his relations to the parties executing the deed. And no such proposition can be maintained.

Then it was said that there were conditions of sale, in which *Walters'* name appeared as the solicitor; but the utmost that can be said is, that you must take the legal and equitable title as you find it conveyed by the deeds; and if you find a sale recited, you are not bound to inquire into all the circumstances of that sale; so if you find any other fact recited, you are not bound to inquire into all the attendant circumstances.

The utmost that can be maintained is, that you must take the consequences of the deduction of title into another person than yourself, and submit to any priority of title so obtained, and the doctrine cannot be put any higher.

I think that the Vice-Chancellor has come to a correct conclusion, and that the negligence of Mr. *Darnell* has caused him, notwithstanding any equities between himself and *Walters,* to be postponed to *Walters'* alienee, Mr. *Curling.*

SIR W. M. JAMES, L.J. :—

This case appears to me one of the simplest and plainest cases that were ever presented to a Court of Equity. It has been con-

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[illegible]

tended on the part of the Appellants that the deed under which Mrs. *Curling* claims title, that is to say, the deed of conveyance to Mr. *Walters,* was an absolute nullity; and this is based upon a statement that one of the mortgagees executed it upon the representation that it was a matter of form, and that it had been previously executed by Mr. *Darnell.*

With regard to Mr. *Darnell,* the other mortgagee, the only evidence is, that it is to be presumed that the deed was executed by him with the full confidence with which he was in the habit of executing all deeds placed before him by his own confidential solicitor, Mr. *Walters.*

To my mind it is almost ludicrous to contend, and it would be most injurious to hold, that a man executing a deed and signing a receipt as a matter of form should be able to say that it is a nullity. Many young men put their names to pieces of paper upon the representation that it is a mere matter of form, and that they will never hear any more of it. They learn by experience that the form is a painful substance. Many a trustee has endeavoured in vain in this Court to escape from the consequences of his acts by saying, "I signed a deed, and I signed a receipt for money as a matter of conformity;" which is another mode for saying, "I executed it as a matter of form." But those trustees have been made most painfully to learn that the instrument they have so signed will, with the consequences, follow them, and cause them to suffer for their negligence.

I am of opinion that such statements as those made to Mr. *Hunter*—such confidence as that which is said to have been reposed by Mr. *Darnell*—are not circumstances which will afford the slightest ground for saying that a deed is void.

We have been referred to the cases of *Kennedy* v. *Green* (1) and *Vorley* v. *Cooke* (2), and other cases, as leading to the conclusion that the deed in this case is void, because certain deeds there were held to be void. As those cases have been cited, I think it right for myself to say that—not in the slightest degree disputing the perfect correctness of the particular conclusions which were arrived at in those cases—not in the slightest degree disputing the correctness of the equitable relief which was given there—I am not prepared to concur in the conclusion that the facts in any one of those cases would have sustained at law a plea of *non est factum;* and if the contention of the Appellants be well founded, that the logical sequence from those cases is that the deed in this case is void, to my mind it would be a very apt and very useful illustration of the argument which is called the *reductio ad absurdum.*

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(1) 3 My. & K. 699.

(2) 1 Giff. 230. 4 Jur N S 3

It is then said that, assuming the legal estate to have passed to *Walters,* so that he was capable of conveying something, and that he had some estate in him at the time when he executed the equitable mortgage to Mr. *Curling,* then there are two conflicting acts in this case; that there was an equity which still remained in *Darnell* prior in time, and therefore prior to the right in equity which Mr. *Curling* acquired by the execution of that deed. To my mind that question also is very simple. We have simply to consider whether, where an agent has committed a fraud, the principal who has trusted that agent, or another person who has dealt with him has to answer for the consequences of that fraud; whether, where a person has, either through fraud or otherwise, executed a deed, and signed a receipt containing an unmistakeable representation of a matter of fact, the person who has so executed the deed and signed the receipt is to suffer the loss arising from an undue use made of them, or another person, who has, in the ordinary course of business, without negligence or default of any kind, trusted to the documents which contained that representation.

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I am of opinion that the rule of equity is the rule of common sense; that the principal must suffer for the fraud of his agent, and not the stranger who is dealing with the agent; that the man who has made the representations, under whatever circumstances, must bear the consequences of those representations, and not the man who has trusted to the representations so made.

7 HL Cas

It was then contended that, assuming all this to be in favour of Mr. *Curling,* there was some degree of negligence on the part of Mr. *Curling's* solicitor, Mr. *Tatham,* which is to postpone the prior equity which otherwise Mr. *Curling* would have. The way in which that was put was this: it was said that if the solicitor had examined the deeds with very great accuracy—if he had minutely examined the maps—if he had minutely examined all the recitals

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in all the deeds shewing the devolution and the deductions from the previous title—he would have been led to the discovery that there were certain inconsistencies in the deeds, that a man was professing to convey under a title which, when carefully examined, did not include the whole of the property; and that if he had gone further, and made further inquiries, it is possible or probable he might have learnt that there had been a sale by auction; and he would have learnt that, upon that sale by auction, certain particulars and conditions of sale were issued which were a mere repetition of particulars and conditions of sale that were used upon some former occasion; and that he would have found that a Mr. *Ralph Walters* was referred to as the person from whom information was to be obtained in respect of it; then he would have inferred from that that Mr. *Ralph Walters* was the solicitor for the parties, and he ought to have inferred that *Ralph Walters*, the alienee in the deed of conveyance, was the same person who had been the solicitor of some of the parties, and, finding that out, he would have been led to make further inquiries which would have resulted in the discovery of the fraud.

It appears to me that the proper place for such an argument as that would be in some satirical work ridiculing, by clever exaggerations, the doctrines of the Court of Equity with respect to constructive notice. It is not, to my mind, a substantial argument, capable of being addressed with any effect to any Court whatever. I am of opinion, upon all these grounds, that this appeal totally fails, and that the decision of the Vice-Chancellor is right, and ought to be affirmed with costs.

SIR G. MELLISH, L.J.:—

The only part of this case upon which I wish to make any observations is, the question whether the legal estate in the property passed by the deed executed by Mr. *Hunter*, and the legal estate in the small portion of it which was in *Darnell*, passed by the same deed as having been executed by *Darnell*. Now, I am of opinion that there is evidence that both *Hunter* and *Darnell* were induced by the fraud of *Walters* to execute that deed; but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of law. But it is said that there is something more than this, and that where a deed is procured by an actual false representation respecting the contents of the deed itself, or respecting the legal effect of the deed, there the deed is not only voidable, but is actually void at law, and, being void, the parties are in the same position as if it had never been executed at all. Thence, no doubt, it would follow, that Mr. *Walters* never got any estate in these premises at all, and therefore that an equitable mortgage by him would be altogether invalid.

Now, in my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it. I do not think that the case of *Swan* v. *North British Australasian Company* (1)—a decision of which the learned Vice-Chancellor disapproves—is really a direct authority upon that question, because in that case a transfer of shares had been executed in blank; the person who executed it owned shares in two companies, and gave authority to the broker to fill them up with shares in one company, and the broker filled them up with shares in another company, which were afterwards transferred to an innocent person. There the Court said that the whole thing was a forgery, and that the negligence of the transferor in executing the deed in blank was not the real and proximate cause of the loss, which was the forgery of the broker in filling the deeds up with shares differing from those which he was authorized to fill them up with. That decision does not go to the extent of saying that if the broker had filled them up with the same shares which he was authorized to insert, and therefore had done what he was authorized to do, that then, because it was void at law from being executed in blank, nevertheless the principal might not have been estopped. Some of the Judges expressed an opinion that in no case where a deed is void in that way could there be an estoppel; but no conclusive opinion was given on that point, and I do not think it necessary for me in this case to give any opinion upon it,

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(1) 7 H. & N. 603.

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because I quite agree with what has been said by the Lord Chancellor and the Lord Justice, that in this case there is no evidence of any such misrepresentation as respects the contents of the deed and the legal effect of the deed, as would make it void on that ground.

Now, what is the case as respects *Hunter?* In the first place, when we are to depend solely on the evidence of the person himself to prove that there was a false representation made to him as to the contents of the deed at the time he executed it, we must look at that evidence with very considerable care before we act upon it so as to set a deed aside as against the person who has *bonâ fide* acted upon the faith of the deed being genuine. Even if we take what he says literally, there is, in my opinion, no sufficient evidence. He is informed by a letter written to him—the letter no doubt contains many false representations, but still he is informed—that the estate has been sold, that Mr. *Walters* himself may become the purchaser, and the object of the deed, he is informed, is the conveyance of the estate; he is also told that the purchaser, who, in fact, is *Walters*, will be willing, if the interest is reduced, to keep the original mortgage; and when the deed is brought, it really is exactly the deed which was requisite to carry out the transaction, with this exception, that it does not contain the new mortgage. If there had been a new mortgage executed by a separate deed, the transaction would have been such as it was represented to be.

Then, when the deed is brought, Mr. *Walters* makes no statement as to what the contents of the deed are, but says it is a mere form, and Mr. *Hunter* does not ask what the contents of the deed are. When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed.

But, as respects *Darnell's* execution, there is absolutely no evidence whatever as to how he came to execute it, though we have reason to suppose that he was induced to execute it by fraud, otherwise it is difficult to see why he should go on receiving the

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interest on the mortgage; but what the fraud was we are wholly ignorant; and to infer, when the evidence is in that state, that the nature of the fraud was a misrepresentation respecting the contents of the deed, or the effect of the deed, is, in my opinion, an inference that certainly no Court ought to draw.

I do not think it necessary to add anything upon the equitable grounds, though I conceive that the parties who signed the receipt are guilty of such negligence that they ought to be postponed in equity to Mr. *Curling,* who had a perfectly equitable title without any notice, and who advanced his money on the faith of the representation contained in that instrument.

Solicitor for Mr. *Darnell:* Mr. *J. Crowdy.*
Solicitors for the Defendants: Messrs. *Farrer, Ouvry, & Co.*

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Nov. 21.

Povi 693.
[illegible]
17 Eq 404
9 Ch 867
4 Ch D 95
[illegible] 56. ICB
7 Ch D 442

CARVER *v.* PINTO LEITE.

Practice—Production of Documents—Discovery.

Although, in considering whether the rule that a Defendant who submits to give discovery must make full discovery is to be applied, the Court does not in general weigh nicely the materiality of the discovery sought still, if the discovery is such as might be used for purposes prejudicial to the Defendant irrespective of the suit, the Court will look narrowly to the question whether there is a reasonable prospect of its being of material service to the plaintiff at the hearing.

The Defendants in a suit to restrain infringement of trade-marks having sealed up certain parts of entries and letters admitted to relate to the matters in question in the cause, were ordered by the Duchy Court of *Lancaster* to unseal the names of customers, and of places, and the prices, forming parts of such entries, and to unseal the portions of letters and copies of letters which contained the names of the writers and of the persons to whom the letters which were copied were sent, and the places to and from which the letters were sent, and the description of the marks to be placed, or which had been placed, on the goods referred to in such letters:—

Held, on appeal, that the Defendants ought not to be compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices, inasmuch as such discovery might be used in a manner prejudicial to the Defendants in their trade, and was not likely to assist the Plaintiffs in making out their case at the hearing; but that the order of the Vice-Chancellor was in other respects right.

THIS was a motion by the Defendants by way of appeal from an order of the Vice-Chancellor of the Duchy Court of *Lancaster* as to the sealing up of parts of certain books and papers, the nature of which will be found stated in the judgment of the Vice-Chancellor.

The bill was filed to prevent the Defendants from impressing on goods exported by them to *Portugal* certain marks which the Plaintiffs alleged to be the Plaintiffs' trade-marks. On the 11th of April, 1870, an order was made for the Defendants to file an affidavit as to documents relating to the matters in question in the suit and to produce them, except such as they might by their affidavit object to produce, the Defendants to be at liberty to seal up such parts of the documents as did not relate to the matters in question in the suit.

The Defendants, by their affidavit, after setting out a schedule of documents, and objecting to produce those in the second part, stated as follows: "We have sealed up part of the documents referred to in the first part of the said schedule, and we swear positively that there is not contained in any or either of the portions so sealed up any memorandum, minute, or entry relating directly or indirectly to the matters in question in this cause, or any of them, or whereby or wherefrom, to the best of our knowledge and belief, the plaintiffs could gather any information or knowledge which would in anywise enable them to establish, or aid them in endeavouring to establish, the claims set up by them in their re-amended bill."

The Defendants having sealed up parts of various entries in their books, and of various letters, relating to the matters in question, the Plaintiffs applied for an order to oblige the Defendants to uncover them, and on the 22nd of August, 1870, the District Registrar made an order that the Defendants should, within fourteen days after service, disclose the entirety of every entry in their books relating to the matters in the suit, and should accordingly unseal and uncover the names of manufacturers, customers, or other persons, and of places, and the prices, and other particulars forming part or parts of such entries in every case in which such names, prices, or particulars were then sealed up or covered. The Defendants applied to the Vice-Chancellor to discharge this order.

On the 24th of March, 1871, the Plaintiffs moved before the Vice-Chancellor that an order might be made directing the Defendants to unseal the whole of the books, letters, copies of letters, and documents produced by them, and which had been sealed up by them; or that the Defendants might be ordered to unseal those portions of the said letters and copies of letters which contained the names of the writers of the said letters, and of the persons to whom those copies were sent, and of the places to and from which the said letters were sent, and which contained a description of the stamp or mark to be placed on, or which had been placed on, the goods referred to in such letters; and that they might also be ordered to unseal those portions of the books which contained the names of the persons by whom the goods were ordered and to whom they were sent, and from whom they ordered them to be manufactured, and also which contained the stamps or marks to be placed upon the said goods, and all reference thereto.

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Before either of these applications to the Vice-Chancellor had been disposed of, the Defendants put in their answer, by which they denied the Plaintiffs' right to the marks as trade-marks, and denied that any deception had been practised on the public. They further stated that they affixed the marks as agents for, and by the directions of, customers in *Portugal*, to whom they sold the goods.

On the 15th of April, 1871, the Vice-Chancellor made the following order upon the motion by the Plaintiffs:—"That the Defendants do, on or before the 9th of June next, unseal and produce to the Plaintiffs the portions of the letters and copies of letters mentioned in their affidavit of documents which contain the names of the writers and of the persons to whom those copies were sent, and of the places from and to which the letters were sent, and which contained a description of the stamp or mark to be placed, or which had been placed, on the goods referred to in such letters."

On the same 15th of April, 1871, the Vice-Chancellor, on the application by the Defendants to discharge or vary the Registrar's order of the 22nd of August, 1870, made an order directing it to be varied by striking out the word "manufacturers," but not further or otherwise (1).

(1) 1871. April 15.

MR. WICKENS, V.C.:—

It is proper to state here, in the first instance, the view that I take of the existing practice as to the discovery of documents.

Before the alterations of the practice in 1852 there was a distinction between the right to a full answer and the right to discovery of documents, inasmuch as the Plaintiff was entitled to a full answer (in the absence of a plea or demurrer) to every question relevant to the statements in the bill, whereas the order for the production of documents was so far discretionary that the Court only made it if, on comparing the bill and answer, the Court thought that the Plaintiff had a *primâ facie* right to see them. This was sometimes said to involve a contradiction, since it would be idle to refuse production of a document which the Plaintiff might require the Defendant to set out *verbatim*. Still, as a matter of fact, it was recognized in practice.

The alteration of practice in 1852 gave the Plaintiff a right to an order on summons for the production and inspection of documents before answer. But it was not, I conceive, intended to enlarge the Plaintiff's right to discovery by a side-wind. I apprehend that the Defendant is still entitled to resist the production of documents before answer, not only on the ground that he intends to plead, or plead and answer, but also on an allegation, supported by such evidence as the circumstances render necessary, that his answer, when filed, will displace the Plaintiff's right to production in whole or in part.

It seems to me that these principles

The Defendants moved, by way of appeal, to discharge the first above-mentioned order of the 15th of April, 1871; so much of the second order of that date as directed the order of the 22nd of

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must apply to the question of sealing up. That which a Defendant is entitled to seal up must be that which if on a separate paper he would not be bound to produce.

It was on these grounds that I postponed my decision on the Defendant's motion till I had seen the answer.

The Defendants deny the Plaintiffs' property in the marks, and any deception on the public effected by means of them. They say that they are mere agents obeying the instructions of customers in *Portugal*, and that the marks complained of are impressed on the covering of the goods by the Defendants' workmen and in their warehouse. And they deny any pecuniary interest which could lead them to perpetrate any such fraudulent acts as are complained of. The impression which the answer conveys is that of an unwillingness to disclose more than is absolutely necessary. But it is fair to observe that what the Defendants seek to guard is the secret of their principals rather than their own.

The documents to which this motion relates are entries in certain trade books described as order books, purchase books, and certain portions of a bundle of invoices. Each item in the order book runs across a double page, and is divided into seven parts. The first and seventh of these are only index numbers. The other five shew, 1. The date of the order; 2. The description of the goods; 3. Who gave it; 4. Whence it came; and 5. To what manufacturer the execution of it was entrusted. Each item in the purchase book runs also across a double page, and after the date and the number of the order contains the following columns: Marks, Of whom bought, Quantity, Price, Description, Value, Delivery, Terms, &c., and Instructions. The invoices are from stamp manufacturers who have supplied the stamps by which the marks are impressed on the goods.

The purchase and order books as produced are sealed up to an extent which cannot well be understood without inspection, but which certainly strikes me as unusual, and as calculated to make useless the discovery to be extracted from them. The order of the District Registrar, which the defendants seek to discharge, is dated the 22nd of August, 1870, and directs that the Defendants shall within a limited time disclose the entirety of every entry in their books relating to the matters in this suit, and shall accordingly unseal and uncover the names of manufacturers, customers, or other persons, and of places, and the prices, or other particulars forming part or parts of such entries, in every case in which such names, prices, or particulars are now sealed up or covered.

It seems to me, after some consideration, that for the purpose of the issues which will have to be tried at the hearing, the names of the manufacturers of the goods can hardly be relevant. The other particulars are, I think, *primâ facie* such as the Plaintiff may reasonably require to see. The case against the Defendants, it will be remembered, is in substance, and taking the bill and answer together, that they are the agents through whom certain Portuguese tradesmen acquire the means of supplanting the Plaintiffs in *Portugal*, selling goods of inferior quality with the marks which the Plaintiffs attach

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August, 1870, to be varied no further than by striking out the word "manufacturers," and the whole of the order of the 22nd of August, 1870.

Mr. *North*, for the appeal motion, referred to *Moore* v. *Craven* (1).

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to goods of superior quality. The goods sold are long since dispersed and irrecoverable, and the only obvious test of their quality would be the price paid for them to the manufacturer. Nor can I doubt that the Plaintiffs are entitled to know the customers' names and the places to which they are sent, and, in fact, all that the purchase and order books shew, except the manufacturers' names. I think also, though with more doubt, that the same principle would apply to the names and addresses of the manufacturers of the stamps as to the names of the manufacturers of the goods. It does not occur to me at present that these names or addresses are likely to be useful to the Plaintiffs for any legitimate purpose, and, on the whole, I am not prepared to order the Defendants to unseal them. I propose to vary the District Registrar's order by striking out the word "manufacturers," but no further.

With regard to the Plaintiffs' motion, I propose to order that the Defendants shall unseal the portions of the letters and copies of letters which contain the names of the writers of the letters, and of the persons to whom those copied were sent, and of the places from and to which the letters were sent, and which contained a description of the stamp or mark to be placed on, or which had been placed on, the goods referred to in such letters.

I am not quite sure that I am right in treating all the rest of the Plaintiffs' notice of motion as being either too large or superfluous. Probably, however, what I have said will sufficiently explain what I think the Plaintiffs' rights are.

(1) 1870. Jan. 26. L. C. & L. J. G.

WN (1870) 73.

MOORE v. CRAVEN.

THIS was an appeal from a decision of Vice-Chancellor Sir *John Stuart*, allowing an exception to the answer of the Defendant.

The bill was filed by the assignees in bankruptcy of Messrs. *Dalby & Chapman*, a firm of wool top makers, alleging an agreement between the bankrupts and the Defendant, that the Defendant should, as agent for the bankrupts, sell such tops as the bankrupts might deliver to him; that he should be paid in respect of sales a commission of 1*s.* 4*d.* per lb. avoirdupois of tops sold by him; and that the Defendant should, in anticipation of sale, make advances to the bankrupts on the security of tops delivered to him.

The bill also alleged that tops to a large extent were delivered to the Defendant for sale by him as agent of the bankrupts; that accounts professing to shew the dealings between the parties had been from time to time furnished by the Defendant; that the Plaintiffs had discovered that it was the practice of the Defendant, in breach of his duty as agent of the bankrupts, to sell the tops delivered to him at a higher price than the amount for which he gave credit in the accounts rendered by him, retaining for his own benefit the difference between the amount for which he gave credit in the accounts and the

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7 LD 447

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Mr. *Robinson, contrà,* referred to *Kerr* on Discovery (1).

Mr. *North,* in reply.

actual sums for which he sold the tops; that the Plaintiffs had also discovered that it was the practice of the Defendant, in further breach of his duty as such agent, to misrepresent to the bankrupts the weight of bags of tops delivered to him for sale as agent, and that the Defendant in fact represented the weight of tops sold by him to be less than their actual weight, and that in this manner the amount for which credit was given by the Defendant was still further reduced below the sums actually received by him; that correspondence had taken place with the view of adjusting the claims of the bankrupts' estate upon the Defendant, but that the Defendant refused to give any information with reference to the sales of tops effected by him, or to state the names and addresses of the persons to whom he sold the same, or to account for the profits made by him and retained for his own use.

A general account was prayed of all dealings and transactions between the Defendant and the bankrupts, and it was prayed that the Defendant might be charged upon taking the account with all profit made by him upon the sale of tops placed in his hands by the bankrupts for sale as their agent.

The Defendant was by the interrogatories required among other things to state the names, addresses, and descriptions of the persons to whom he sold the tops, and the prices at which he sold them.

The Defendant by his answer denied that he had entered into the agreement alleged in the bill, and that he had ever sold tops as agent for the bankrupts.

He admitted that they had delivered to him tops which he had afterwards sold, but alleged that in every case he purchased the tops from the bankrupts before selling them, and that the prices mentioned in the accounts were the prices at which he purchased from the bankrupts.

He admitted that the prices obtained by him on sales of tops for the most part did exceed those given by him to the bankrupts for the same tops, and that if the Plaintiffs were to establish his liability to account to them for any excess of the sums received over those allowed by him, a balance would be payable by him to the Plaintiffs.

He refused to answer the interrogatories as to the prices for which, and the names and addresses and descriptions of the persons to whom, he sold the tops, and his reasons for such refusal were stated in his answer as follows:—

"The discovery sought from me by the interrogatories filed for my examination as to the prices for which, and the names and addresses and descriptions of the persons to whom, the tops furnished to me by the said *Dalby & Chapman* were sold by me, would not, if I were to answer the said interrogatories fully as to such parts thereof as I have hereinbefore declined to answer, in any manner tend or assist to make out, and is not in any manner relevant to, the right of the Plaintiffs to demand, or my liability to render, such an account as aforesaid. The Plaintiffs are themselves top dealers, and they and also the said *Dalby & Chapman* are my rivals in trade, and the information which they seek from me by the interrogatories, or

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(1) Page 167.

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SIR W. M. JAMES, L.J.:—

In this case it appears to me that the Vice-Chancellor is substantially right. It is important to adhere to the rule of the

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parts of interrogatories, which I have declined to answer, would give them an unfair advantage over me in my trade. Even if the Plaintiffs were to establish as against me their right to such an account as aforesaid (the possibility of which I deny), the discovery which they seek from me by the interrogatories, or part of interrogatories, which I have declined to answer would not in any manner tend or assist to establish their right to, or be in any manner relevant to, any decree which they could by any possibility obtain at the hearing of this cause."

The Plaintiffs excepted to the answer for not setting forth the names, addresses, and descriptions of the persons to whom the tops furnished to the Defendant by the bankrupt were sold, but did not except on the ground of the refusal to set forth the prices realized.

The Vice-Chancellor allowed the exception, and the Defendant appealed.

Mr. *Dickinson*, Q.C., and Mr. *Rigby*, for the Appellant:—

The agency is clearly and circumstantially denied by the Defendant, and the Plaintiffs are not entitled to the discovery sought until the agency is proved. The only issue to be tried at the hearing is that of agency or no agency. If agency is established a decree to account would be a matter of course, and the Defendant admits that in that case a balance would be due from him. To entitle a Plaintiff to discovery he must shew that it is material, and that it would of itself assist him towards a decree. It is not enough to say, as was said below, that the discovery might put the Plaintiff in the way of getting at facts which might so assist him. To give a schedule of names, addresses, and descriptions of purchasers would not of itself in any manner assist the Plaintiffs in getting a decree and might be very injurious to the Defendant.

[They cited *Marquis of Donegal* v. *Stewart* (3 Ves. 446), *De La Rue* v. *Dickinson* (3 K. & J. 388), and referred to *Wigram* on Discovery (Pages 157, 158, 168, and 169).]

Mr. *Greene*, Q.C., and Mr. *Ince*, for Plaintiffs, cited and relied upon *Howe* v. *M'Kernan* (30 Beav. 547), and argued that if they had the names and addresses of purchasers they might, by inquiry from them, or by inspection of invoices made out by the Defendant to them, ascertain that he actually sold as agent for the bankrupts, and thereby establish the Plaintiff's right to a decree, and that they might in like manner ascertain prices and weights at and according to which the Defendant sold, and by means of such information make out such a case of fraud as would entitle them to open the accounts.

[They also cited *Kay* v. *Hargreaves* (14 L. T. (N. S.), 281).]

LORD HATHERLEY, L. C.:—

The Court does not, when discovery is a matter of indifference to the Defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the Defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand,

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Court, that where the Defendant cannot protect himself from giving discovery, there should be a full discovery of anything which is reasonably material to the Plaintiff's case at the hearing, and which may be produced without any overwhelming amount of injury to the Defendant. Generally speaking, as the Lord Chancellor, if I may venture to say so, well expressed it, the Court does not weigh in golden scales the materiality or immateriality of the discovery in considering whether the rule is to be applied—that he who discovers at all must discover fully; but, as he goes on to say, there are cases in which it is important that the Court should so weigh it, namely, cases in which the discovery is such as the Plaintiff, though failing at the hearing, may afterwards use in a way prejudicial to the Defendant. In such cases it is important to consider whether the discovery is material for the purpose of enabling the Plaintiff to establish his case at the hearing, or material only for the subsequent purposes of the suit, in case the Plaintiff should succeed. I am not at all disposed to grant discovery when I am satisfied that it is likely to be injurious to the Defendant, and am not satisfied that there is any real prospect of its being of material service to the Plaintiff at the hearing. Upon that ground I think the Vice-Chancellor's order in this case should be varied by not compelling the Defendants to discover the names of customers, nor to discover the prices at which the goods were sold to them or bought from anybody else. Those are matters which only concern the Defendants' trade, and a discovery of which cannot, as it seems to me, in any way aid the Plaintiffs in establishing their title to the marks in question.

As to the other points to which attention has been drawn by

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it takes care that the Plaintiff obtains all the discovery which can be of use to him, on the other it is bound to protect the Defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the Plaintiff's pleadings, and to what will be in issue at the hearing. Here the question to be decided is, agency or no agency. If agency is proved, the Defendant admits that there would be a right to an account. The names and addresses of the purchasers, even if fully set out, would not in any manner tend to prove agency.

The interrogatory, therefore, is not material to the issue about to be tried, and the exception must be overruled with costs.

Sir G. M. Giffard, L.J., concurred.

Solicitors: Messrs. *Edwards, Layton, & Jaques;* Messrs. *Johnson & Weatheralls.*

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Mr. *North*, I am not disposed to vary the Vice-Chancellor's order. In some cases the Defendants uncover part of a mark, admitting it to be part of one of the marks claimed by the Plaintiffs. I think that in such a case the Plaintiffs are entitled to see the whole of the mark, for the combination in which that part of a mark occurs may have a bearing upon the question of infringement or non-infringement. I think that the Plaintiffs also have a right to see what directions were given to the Defendants with respect to those marks. That may have a very considerable bearing, if not immediately on the relief, certainly upon the costs to be given at the hearing. Then the Defendant seeks to avoid discovery as to what the circumstances were under which the marks were put on the cloth. I cannot see what possible harm such discovery can do the Defendants if the Plaintiffs fail at the hearing, and it may materially help the Plaintiffs; and so with regard to what the marks were which were actually put on, and what directions were given as to that. Then as to the names of the people to whom the goods were sent, it does seem to me that there can be no harm in the Defendant shewing the names of the places in *Portugal* (he admits they all went there) to which the goods were sent. It is not like the case of a trade secret of any kind. That being so, it appears to me that our order should be to this effect:—

Direct that, notwithstanding the order of the District Registrar of the 22nd of August, 1870, and the Vice-Chancellor's two orders of the 15th of April, 1871, the Defendants are not to be required to unseal any portion of any document containing the names or the initial letters of the names of purchasers or customers, or the names of any persons to or from whom any letters produced were written or received (other than letters written to or by *Arsenio Pinto Leite* (1)), or the addresses by post (other than the names of towns) of such customers, purchasers, or persons, or any prices. And that with respect to any portions of books or letters or copies of letters which contain any description of the stamp or mark to be placed, or which had been placed, on the goods referred to in such books or letters, or copies of letters, the discovery by the

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(1) A former partner of the Defendants.

Defendants is to be limited to such stamps or marks (other than the names of any customers or purchasers stamped or to be stamped on those goods) as may be referred to in any parts of letters, or copies of letters, or in any parts of such books, which have been or may be uncovered. And such discovery as the Defendants have to make under the said orders, having regard to this order, is to be made within seven days from the date hereof.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Sale, Shipman, & Seddon, Manchester; J. Elliot Fox*, Agent for Messrs. *Earle, Son, Orford, & Co., Manchester.*

In re ORIENTAL COMMERCIAL BANK.
Ex parte EUROPEAN BANK.

L. JJ.
1871
Nov. 24.

Winding-up—Double Proof—Letter of Credit—Accommodation Bills—Liability of Drawer to Proof both by Holder and Acceptor.

Bills of exchange were accepted by the *E. Company*, at the request of the *O. Company*, upon an undertaking by the *O. Company* that they would provide funds to meet the bills at maturity. The bills were indorsed by the *O. Company*, and discounted; but before they arrived at maturity both the *E.* and *O. Companies* had stopped payment, and were in process of liquidation, and the bills were dishonoured. The holders of the bills recovered the amount due on them by proofs against the estates of both companies under their respective windings-up:—

Held (reversing the decision of *Bacon*, V.C.), that the *E. Company* were not entitled under the contract of indemnity to prove as creditors against the *O. Company* for the amount that had been recovered from the estate by the holders of the bills.

The rule in bankruptcy that there cannot be a double proof against the same estate in respect of the same debt, *held* to apply in cases of winding-up under the *Companies Act*, 1862.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*, made in the winding-up of the *Oriental Commercial Bank, Limited* (1). The facts were shortly as follows:—

On the 12th of March, 1866, Mr. *D. Pappa*, the manager of the

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(1) Law Rep. 12 Eq. 501.

Oriental Commercial Bank, wrote to the manager of the *European Bank* as follows:—

"We beg to advise you that our *Galatz* correspondent, Mr. *E. Constantinidi,* has valued upon your establishment for our account in the sum of £15,250, as per particulars at foot, which drafts please honour on presentation for our account, on the usual understanding that we furnish you with funds to meet the same at maturity."

In consequence of this undertaking, Mr. *Constantinidi* drew bills to the amount of £8800, which were accepted by the *European Bank,* and handed to the *Oriental Commercial Bank* as agents of the drawer, and indorsed by them to the *Agra Bank,* who discounted them.

When the bills became due all the three banks had stopped payment, and were in process of liquidation; and as no funds had been provided to the *European,* the bills were dishonoured.

The *Agra Bank,* the holders of the bills, proved against the *European Bank* for £8804 1*s.* 6*d.*, and received a first dividend of 3*s.* 4*d.* in the pound, amounting to £1467 6*s.* 11*d.* They then proved against the *Oriental Commercial Bank,* as the indorsers, for the balance of £7336 14*s.* 7*d.*, and received from their estate a dividend of 13*s.* in the pound. They subsequently received a further dividend of 6*s.* 8*d.* in the pound from the *European Bank* on their original proof. The result was that they recovered the full amount of their debt; half being paid by the *European,* and half by the *Oriental Commercial Bank.*

The *Oriental Commercial Bank* afterwards paid the *European Bank* 13*s.* in the pound on the sum of £1467 6*s.* 11*d.*, and 2*s.* in the pound on the whole amount of the bills; so that they altogether paid 15*s.* in the pound on the whole amount of the bills, which was the amount of dividend paid to their other creditors.

The liquidators of the *European Bank* afterwards sought to be admitted creditors against the estate of the *Oriental Commercial Bank* for the sum of £4402 0*s.* 9*d.*, which they had been compelled to pay through the breach of the undertaking to provide them with funds to meet the bills at maturity. The Vice-Chancellor admitted the proof, and the liquidators of the *Oriental Commercial Bank* appealed from this decision.

Mr. *De Gex*, Q.C., Mr. *Kay*, Q.C., and Mr. *Jackson*, for the Appellants:—

The effect of the Vice-Chancellor's decision is to fix the *Oriental Commercial Bank* with a double liability, and to make them pay dividends twice over on the same debt. If the *European Bank* had remained solvent, and had paid the bills at maturity in full, they could then have proved against the *Oriental Commercial*, and would have received the same dividend as the other creditors, and the *Oriental Commercial Bank* would have been subject to no claim from the holders of the bills. This claim is contrary to the settled rule in bankruptcy. In the ordinary case of an accommodation bill, where the drawer and acceptor are both bankrupt, the holder of the bill can prove against both estates, but the acceptor cannot prove against the drawer on the implied contract that he would meet the bills at maturity, without giving credit for what the estate of the drawer has paid to the bill holder; and to this extent we have not disputed their right, and have paid them so much as, with the amount which we paid to the *Agra*, makes up the same dividend (15*s*. in the pound) which we have paid to our other creditors: *Byles* on Bills (1); *Ex parte Biddulph* (2); *Ex parte Carne* (3). It can make no difference that the *Oriental Commercial Bank* were not the drawers, but had entered into an express contract with the acceptors, instead of an implied one. The same rule is applied in bankruptcy in the case of the joint and separate estates of partners. It is a reasonable rule, and is applicable to the administration of estates in the winding up of companies, as well as in bankruptcy: *Rigby* v. *Macnamara* (4); *Companies Act*, 1862, ss. 133, 158.

Mr. *Eddis*, Q.C., and Mr. *Graham Hastings*, for the *European Bank*:—

This is different from the ordinary case of an accommodation bill, in which the implied contract is, that the acceptor shall be borne harmless: *Reynolds* v. *Doyle* (1). Here the bills were accepted upon the undertaking that before they arrived at maturity a sum sufficient to meet them should be lodged with the acceptors. The holders could not have proved at all against the *Oriental Commercial Bank* unless they had indorsed the bills. The case, therefore, turns upon this special contract, not upon the ordinary relationship of debtor and creditor: *Prehn* v. *Royal Bank of Liverpool* (2); *Yates* v. *Hoppe* (3). The essence of the rule against double proof is the identity of the debt; but here the debts are totally distinct. The contract was, in fact, broken before the bills came to maturity, and we are entitled to prove for the damage sustained by the breach of that contract.

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(1) 10th Ed. p. 450.

(2) 3 De G. & Sm. 587; 6 D. M. & G. 795.

(3) Law Rep. 3 Ch. 463.

(4) 2 Cox. 415.

SIR G. MELLISH, L.J., after shortly stating the facts of the case, continued:—

It is quite obvious that if this proof is allowed the *Oriental Commercial Bank* will pay a double dividend on the same debt. It appears to me clearly that it is substantially the same debt; because if all parties had been solvent, whatever sums the *Oriental Commercial Bank* might have paid to the *Agra Bank*, although they would have paid it, no doubt, for the purpose of performing the contract they had entered into by their indorsement, yet, substantially, whatever sums they might have paid to the *Agra Bank* would have gone in reduction of the sum which the *Oriental Commercial Bank* had promised to pay to the *European Bank*. In that case the *Oriental Commercial Bank* could never have been called upon to pay these bills twice over. It would have made no difference that they had entered into two contracts with two separate parties that they would pay the bills—namely, with the *European Bank* as acceptors, and with the *Agra Bank* as holders. It is clear that they would have performed both contracts by paying the bills once, because they had guaranteed the acceptors; and, in fact, the acceptance having been an acceptance for their use, their payment to the *Agra Bank* would, in substance and in point of law, have been a payment by the acceptors.

(1) 2 Scott, N. R. 45. (2) Law Rep. 5 Ex. 92. (3) 9 C. B. 541.

L. JJ.
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Then the question is, whether, the parties being insolvent, the *Oriental Commercial Bank* can be liable to pay two dividends on the same debt? It has been the law for a great number of years with reference to proofs in bankruptcy, that if an acceptor accepts bills for the accommodation of the drawer, and the drawer enters into a contract, either express or implied (and I do not think there is any difference between the two), that he will provide for the bills when they become due, and then the drawer becomes bankrupt, there cannot be a double proof against his estate, namely, one proof by the holder of the bill, and the other proof by the acceptor of the bill on the contract of indemnity. Then the real question before us is this: Does it make any distinction that the *Oriental Commercial Bank* were not drawers, but entered into the contract with the acceptors, and afterwards became liable for the bills as indorsers? It appears to me that that ought not to make any distinction, although I do not find any precise decision upon the point. The case of *Rigby* v. *Macnamara* (1) tends to shew that this rule against double proof applies in the Court of Chancery as well as in the Court of Bankruptcy, and therefore would apply equally where companies are being wound up. It seems to me that the principle is a perfectly sound one. Authorities have been cited to shew that there cannot be double proof against joint and separate estates. That is really carrying the same principle still further, for in that case the proof is not twice against the same estate, but against different estates though belonging to the same person. As to that application of the principle, some Judges have said that it should not be carried any further. But the principle itself—that an insolvent estate, whether wound up in Chancery or in Bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there

(1) 2 Cox, 415.

may be two separate contracts. Therefore, upon the whole, with great respect to the Vice-Chancellor, I am of opinion that this proof should not be allowed.

SIR W. M. JAMES, L.J.:—

I entirely concur.

Solicitors for the *Oriental Commercial Bank*: Messrs. *Uptons, Johnson, & Co.*

Solicitors for the *European Bank*: Messrs. *Argles & Rawlins.*

L. JJ.
1871
Dec. 4.

ELLIS *v.* BARKER.

[1870 E. 21.]

Setting aside Deed—Trustee—Pressure.

A testator by his will desired his trustees to give up his farm to his nephew, the Plaintiff, if the landlord would accept him as tenant; and in that case he bequeathed to him the farming stock. He also gave some real property to the Plaintiff, and gave legacies and annuities to the Plaintiff's father, mother, and sisters, and other persons, including the trustees. One of the trustees of the will was steward to the landlord. There were hardly any assets to pay the legacies and annuities if the Plaintiff took the farming stock, upon which the trustees represented the case to the landlord, who left it to their decision whether the Plaintiff should be accepted as tenant. They accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate to pay the legacies and annuities:—

Held (affirming the decision of the Master of the Rolls), that it was a breach of trust on the part of the trustees to endeavour to induce the landlord to refuse his consent to the Plaintiff having the tenancy, which the testator had by his will expressed his wish for him to have; and that the deed, having been obtained by means of that breach of trust, must be set aside; and that the trustees, having made the suit necessary, and hostilely contested the Plaintiff's right to relief, must pay the costs of the suit.

THIS was an appeal by the Defendants, the trustees of the will of *Francis Ellis*, from a decree of the Master of the Rolls.

By will, dated the 7th of June, 1865, the testator appointed *Barker* and *Godfrey* his trustees, and gave them each a legacy of £100. He gave his real estate to his nephew, the Plaintiff, in fee. He bequeathed to the superintendent in his shop a life annuity of £30, and to his housekeeper a legacy of £100, and to another person a life annuity of £20, and gave several small legacies to different persons. He then gave to the Plaintiff's father a life annuity of £100, and to the Plaintiff's mother, if she survived her husband, a life annuity of £50. Then, after reciting that he was tenant from year to year of a farm at *Flixborough*, under Sir *Robert Sheffield*, he declared it to be his wish and desire, and he authorized his trustees, to give up the tenancy in favour of the Plaintiff, if the landlord would accept him as tenant; and if he should be accepted as tenant, but not otherwise, the testator bequeathed to him the farming stock and implements of husbandry upon the farm. He then gave his personal estate to *Barker* and *Godfrey* upon trust to convert it, and in the first place pay thereout his just debts, and funeral and testamentary expenses and legacies, and then invest sufficient funds for the payment of the annuities; and, subject thereto, invest £3500 upon the trusts therein mentioned for the benefit of the Plaintiff's seven sisters and their respective children; and he bequeathed the residue to the Plaintiff.

The testator died in December, 1865. At the time of his death the title-deeds of most of the estate devised to the Plaintiff were deposited with the testator's bankers as security for £2000. On investigating the state of the assets it was found that if, after this debt was paid off, the Plaintiff took the farming stock, there would be hardly anything left to pay legacies, including the £3500.

Barker, one of the trustees of the will, was also Sir *R. Sheffield's* agent. The trustees took the advice of counsel as to the effect of the will, and as to obtaining some concession from the Plaintiff. Counsel advised that, according to *Stone* v. *Barker* (1), *Smith* v. *Smith* (2), and *Eno* v. *Tatham* (3), the Plaintiff was entitled to have the devised estate exonerated out of the personalty, and warned the trustees against exerting any pressure upon the Plaintiff to make him give up his rights.

Barker, however, represented the matter to Sir *R. Sheffield*, and informed him that the testator had purported to make provision for the Plaintiff's father and mother, and their family; that there was not money for the purpose; that if the Plaintiff was accepted tenant, almost everything would go to him, but that if he was not accepted as tenant, the stock, crops, and tenant's rights would go among his father, mother, and sisters. Sir *Robert* thereupon said,

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(1) 1 Dr. & Sm. 212. (2) 3 Giff. 263. (3) 3 D. J. & S. 443. 9 Jur N.S. 481

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that unless the Plaintiff acted rightly and honourably in the matter he would not accept him as tenant. *Barker* then, in March, 1866, wrote to the Plaintiff as follows:—

"Mr. *Godfrey* and myself intend to come over to-morrow to talk over what has been mentioned to you before, and to come to some conclusion thereon. Our proposal will be this—to offer to put you into full possession of the *Flixborough* farm just as it stands at present, together with £200 put in the bank for you, if you will give up your right to the property at *Brigg* and *Ferry*. I mentioned the affair to Sir *Robert*, and he states that he will do what the trustees think right. I have put it in writing, in order that you may have the opportunity of making up your mind before we come. I am satisfied that all depends upon what you will do, as if the land be kept a break-up at *Flixborough* will be sure to follow, which I should be very sorry for. I don't know that there is any necessity to state anything more at present."

On the following day *Barker* and *Godfrey* called on the Plaintiff, and he assented to their terms, and accordingly, by a deed of the 13th of March, 1866, the Plaintiff conveyed the real estate to *Barker* and *Godfrey*, upon trust to sell and to hold the proceeds upon the trusts declared by the testator's will concerning his personal estate, after payment of his debts and funeral and testamentary expenses. The Plaintiff had no independent advice as to this deed.

The Plaintiff was thereupon accepted as tenant, and the £200 was placed to his credit at the bank, and the stock, implements of husbandry, and crops were delivered to him.

By a further deed of the 5th of June, 1867, to which the Plaintiff and his father, mother, and sisters were parties, it was agreed that the legacies and annuities to strangers in blood should be paid in full, and that the Plaintiff, his father, mother, and sisters, would accept, in full satisfaction of their demands, the balance which would remain in the hands of *Barker* and *Godfrey* after making such payment. The Plaintiff at the same time signed a memorandum, agreeing that he would make up the amount of the loss sustained by his father, mother, sisters, and nephews and nieces, before receiving anything from the residue. The trustees acted upon the above arrangement, and retained their own legacies.

In March, 1870, the Plaintiff filed his bill to set aside the deeds,

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as executed by him in ignorance of his rights, and under pressure from the trustees. The Master of the Rolls, on the 21st of June, 1871, made a decree declaring that the deeds were obtained by the trustees by coercion, and ought to be set aside, and ordering "that the same be set aside accordingly, so far as all future transactions thereunder are concerned." It was declared that *Barker* and *Godfrey* ought to refund their legacies of £100 each, so far as they had been retained by them in excess of what they ought to have received if such deeds had not been executed. The Plaintiff was directed to pay the costs of the Defendants other than *Barker* and *Godfrey*, and add them to his own, and *Barker* and *Godfrey* were ordered to pay the whole.

The *Solicitor-General* (Mr. *Jessel*, Q.C.), Mr. *Fry*, Q.C., and Mr. *Bedwell*, for the Appellants, contended that the arrangement was a reasonable family arrangement, which put matters on the footing on which they would have stood if the Act 30 & 31 Vict. c. 69 had been passed a few years earlier, and that its having been brought about by pressure was not, according to the principles applicable to such arrangements, a ground for setting it aside, as the trustees had not promoted it for the purpose of securing an advantage to themselves. They referred to *Hoghton* v. *Hoghton* (1), *Wycherley* v. *Wycherley* (2), *Westby* v. *Westby* (3).

Sir *R. Baggallay*, Q.C., and Mr. *Macnaghten*, for the Plaintiff; and Mr. *Coltman*, for other Respondents, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decree of the Master of the Rolls in this case is quite right, both as regards the relief granted and the costs. The testator, by his will, the meaning of which is beyond all reasonable doubt, appointed two trustees, one of whom was the steward of the testator's landlord. By his will, the testator shews a clear intention that his nephew, the Plaintiff, should have the testator's farm given up to him, and should be continued as tenant if the landlord would accept him, and in that event the testator bequeaths to him the stock on the farm. The testator also gives him two freehold properties. On investigating the state of the

(1) 15 Beav. 278.
(2) 2 Eden, 174, 177.
(3) 2 D. & War. 502.

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assets, it was found that there was not enough to pay the legacies and annuities, including those to the testator's father, mother, and sisters. The trustees thereupon came to the conclusion that the will was made by the testator in ignorance, not of the decision in *Eno* v. *Tatham* (1), but of the amount of his assets. They honestly believed that he made it under a mistake. Still they were the trustees of that will, and their duty was to carry its trusts into effect impartially; they had no right to use the power given to them by their position as trustees, or any other power which they had, as a means of making a new will for the testator; for that is what their proceedings come to. They, however, thought it morally right to extort a concession from the Plaintiff. They consulted counsel, who gave them a cautious opinion, saying that they might properly represent the case to the Plaintiff to induce him to make some concession; but emphatically warning them against exerting any pressure. Notwithstanding this they went to the landlord—they say they only told him the state of things, and that may be so, still the fact remains that they, being trustees, went to the landlord—for the purpose of obtaining the power of holding out the threat contained in the letter addressed to the Plaintiff in March, 1866. It was a breach of duty on the part of the trustees to endeavour to induce the landlord to refuse his consent on any grounds to what the testator shewed by his will that he wished and intended. Then they use the power thus obtained from the landlord by saying, "If you do not sign this deed" (a deed, it must be observed, going much further than what they had told the landlord), "we will break up your farm." To my mind, this was as clear a breach of trust as I have ever seen. Then, as to the defence that the trustees acted under the notion that they were doing what was morally right, they might have simply submitted the point to the Court, instead of which they have fought out the case, and involved the Plaintiff in a very expensive and hostile litigation. Having done this, they, like any other unsuccessful litigant, must indemnify the successful one against the costs.

Sir G. Mellish, L.J., concurred.

Solicitors: Messrs. *R. Lambert & Son*; Messrs. *Scott & Co.*

(1) 3 D. J. & S. 443. 9 Jur. N.S. 401

CALISHER *v.* FORBES.

[1870 C. 52.]

L. JJ.
1871
Dec. 5.

Mortgages—Priority—Notice—Proceeds of Sale of Commission—Further Advances.

16 Ch D. 374
375,

F., an officer in the army, gave to the Plaintiff, in March, a charge on the proceeds of the sale of his commission, for a bill for £62 10*s.* discounted for him by the Plaintiff, and " for any further sum or sums that you may advance, or for which I may be liable to you." In June *F.* gave *R.* a charge on the same moneys, and in July gave the *O. Bank* a charge. In August the bill for £62 10*s.* not having been paid, *F.* gave the Plaintiff, who had no notice of the other incumbrances, a fresh bill for £88 14*s.*, being the amount of the former with interest and costs. *F.* also gave *B.* a charge on the 8th of September, and *L.* a charge on the 14th of September. The Plaintiff, still without notice, on the 18th of September, discounted a £25 bill for *F.*; and, at what time did not appear, became indorsee from *B.* of a bill for £80 accepted by *F.* The proceeds of the sale of *F.*'s commission were in the hands of *H. & Co.* for distribution at, and not before, the opening of their bank on the 8th of December. The *O. Bank* left notice by letter of their charge at *H. & Co.*'s bank on the 7th, after it had closed for the evening; the other incumbrancers gave notice at nine on the morning of the 8th when the bank opened:—

Held, by the Master of the Rolls, that the charges ranked as follows: (1) *R.*'s charge; (2) the Plaintiff's bill of £88 14*s.*; (3) the Plaintiff's £80 bill indorsed to him by *B.*; (4) *B.*'s charge; (5) the Plaintiff's bill for £25; (6) *L.*'s charge; (7) the *O. Bank*:

Held, on appeal, that the notice of the *O. Bank* being delivered after banking hours on the 7th was good as a notice for the opening of the bank on the 8th, and that all the notices were to be treated as contemporaneous; that the renewal of the Plaintiff's bill in August did not postpone his security; that the Plaintiff's £25 bill as a further advance had the same priority as the £88 14*s.*, but that the £80 bill was not included in the Plaintiff's security, and that the securities must rank as follows: (1) the Plaintiff's £88 14*s.* and £25; (2) *R.*'s charge; (3) the charge of the *O. Bank*, and then the other charges in the order of their dates.

THIS case came before the Court on two appeals, one by the *Oriental Bank Corporation*, and the other by the Plaintiff, from a decree of the Master of the Rolls settling the priorities of charges on the proceeds of the sale of the commission of the Defendant *Forbes*.

The claims which have to be noticed were as follows:—

On the 29th of March, 1869, the Plaintiff discounted a bill for

Forbes, who signed and gave to him the following letter of that date:—

"In consideration of your discounting my acceptance for £62 10*s.*, dated this day and payable three months after date, I do hereby undertake and agree to charge and assign the proceeds to arise from the sale of my commission, or arising from any exchange from one regiment to another, to that extent in your favour. And I further undertake and agree, and do charge and assign the money to arise from the sale or exchange of my commission as aforesaid in your favour for any further sum or sums that you may advance, or for which I may be liable to you, together with any interest or costs incurred in respect of the same, in the event of my retiring from the service before the said sum or sums become due, or when due and unpaid."

The bill was not paid at maturity, and on the 2nd of August, 1869, *Forbes* accepted another bill, payable two months after date, for £88 14*s.*, being the amount of the former bill with charges for interest and costs. On the 18th of September, 1869, the Plaintiff discounted for *Forbes* another bill for £25, payable three months after date. It was not alleged that when he did this he had any notice of any of the mesne incumbrances which are about to be mentioned.

On the 13th of August, 1869, *Benjamin* discounted for *Forbes* a bill of exchange for £80, accepted by *Forbes* and payable two months after date. This bill was subsequently indorsed by *Benjamin* to the Plaintiff; but at what time this indorsement took place was not stated in the Plaintiff's bill, nor did it appear from the evidence.

The next charge to be noticed is that of the Defendant *Rubenstein* for £62 10*s.*, created by a letter dated the 4th of June, 1869, which need not be set forth.

Another charge was that of the *Oriental Bank Corporation* for £300, which charge was created by a letter dated the 23rd of July, 1869.

The Defendant *Benjamin* had a charge dated the 8th of September, 1869, and the Defendant *Lewis* a charge dated the 14th of September, 1869.

On the 7th of December, 1869, *Forbes*, having sold his commission, was gazetted out of his regiment. Previously to this the sum of £700, being the regulation price, was paid into the hands of the Defendants *Hopkinson & Co.*, bankers and army agents, as agents for the regiment; and on the morning of the 8th of December, and not before, it became their duty to issue this sum to *Forbes*, less a sum of £200, which they had received instructions from the *Horse Guards* to retain to provide for *Forbes*' regimental debts.

The *Oriental Bank Corporation* served notice of their charge on *Hopkinson & Co.* at their place of business at half-past five o'clock on the evening of the 7th of December, after the bank had closed for the night. The Plaintiff, *Rubenstein*, and *Benjamin*, served notice of their incumbrances at nine o'clock on the following morning as soon as the bank opened. *Lewis* served notice of his incumbrance about half-past nine.

This bill having been filed against *Forbes*, his incumbrancers, and Messrs. *Hopkinson*, to enforce the Plaintiff's security, the Master of the Rolls decided that the claims ranked in the following order: (1) *Rubenstein's* bill; (2) the Plaintiff's bill for £88 14*s.*; (3) the Plaintiff's bill for £80, which had been indorsed to him by *Benjamin*; (4) *Benjamin's* charge of the 8th of September, 1869; (5) the Plaintiff's bill for £25; (6) *Lewis's* charge of the 14th of September, 1869; (7) the charge of the *Oriental Bank Corporation.* The Plaintiff's bill for £88 14*s.* was postponed to *Rubenstein's* charge, on the ground that the debt of March, 1869, was merged in that of the 2nd of August. Both the Plaintiff and the *Oriental Bank Corporation* appealed from this decree.

Sir *R. Baggallay*, Q.C., and Mr. *Freeman*, for the *Oriental Bank Corporation*:—

Our notice, delivered at half-past five on the 7th, must be presumed to have been read before the bank opened on the 8th, and therefore before the other notices were served. We ought, therefore, to rank first. But if not, at all events, our notice is good for the morning of the 8th; and the notices must be treated as given contemporaneously, leaving the incumbrancers to rank according to date, in which case we have priority over every one but *Ruben-*

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stein; for the Plaintiff's security, after renewal of his bill, can only date from the 2nd of August, 1869.

[They referred to *Buller* v. *Plunkett* (1), *Burn* v. *Carvalho* (2), *Earl of Suffolk* v. *Cox* (3).]

Mr. *Swanston*, Q.C., and Mr. *Kisch*, for the Plaintiff:—

We appeal from the decree so far as it postpones the Plaintiff to *Rubenstein*. The renewal of the Plaintiff's bill merely gives a new security for the old debt, and can in no way affect the priority of the Plaintiff's charge. The Plaintiff had no notice of intervening incumbrances, so *Hopkinson* v. *Rolt* (4) does not make against him, and he can add his further advances.

[The Lord Justice James:—Do further advances take priority of mesne incumbrances where the security is only equitable?]

The security was equitable only in *Hopkinson* v. *Rolt*. *Benjamin's* bill is within the security. The Plaintiff can sue *Forbes* in his own name at law for the amount; so how can it be said not to be within the words "sums for which I may be liable to you"? The Plaintiff, therefore, ought to stand before *Rubenstein* as to all his three bills.

Then, as regards the appeal of the *Oriental Bank*, we contend that the Master of the Rolls was right in treating their notice as worthless. A notice, though after office hours, is still notice on the day on which it is served: *Papillon* v. *Brunton* (5). Now, a notice on the 7th was premature, and therefore invalid: *Buller* v. *Plunkett*; *Yates* v. *Cox* (6); *Webster* v. *Webster* (7); *Earl of Suffolk* v. *Cox*; *Boss* v. *Hopkinson* (8).

Mr. *Horton Smith*, for *Rubenstein*, having been informed by the Court that he need not address himself to the £80 bill from *Benjamin*, proceeded to contend that the renewal of the Plaintiff's first bill postponed his security, and that the further advances could not prevail against mesne incumbrancers who had no notice of the original security, and so could not give notice of their securities, and stop the making further advances.

(1) 1 J. & H. 441. 7 Jur. N.S. 873
(2) 4 My. & Cr. 690.
(3) 15 W. R. 732.
(4) 9 H. L. C. 514. 7 Jur N.S. 1209
(5) 5 H. & N. 518.
(6) 17 W. R. 20. WN (1868) 24
(7) 31 Beav. 393. 8 Jur N.S. 10
(8) 18 W. R. 725.

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SIR W. M. JAMES, L.J. :—

I am of opinion, and the Lord Justice agrees with me, that there is no substantial question as to the notice which was left at the bank after business hours, as it was contained in a letter which, in the ordinary course of business, would not be opened before the opening of the bank on the morning of the 8th of December. It must be considered, to all intents and purposes, as a notice received at the same time with the other notices, on the morning of the 8th; and we are of opinion that no priority by notice has been given by any one, but that the incumbrances must take effect according to their dates.

The first security in order of date is that of the Plaintiff, which was given to secure the money advanced on a bill of exchange for £62 10*s.*, and any further sums which the Plaintiff might advance to *Forbes*, or for which *Forbes* might be liable to the Plaintiff. I am of opinion that this is a continuing security, the priority of which is not affected by the renewal of the original bill of exchange, and that the £25 bill, which was discounted by the Plaintiff without notice of the intermediate incumbrances, is included in this security. The Plaintiff, therefore, is the first incumbrancer to the extent of the bills for £88 14*s.* and £25. But I am of opinion that this does not extend to the bill which the Plaintiff received from *Benjamin*, and for two reasons; First, I think that the moneys payable under this bill do not come within the fair meaning of the words of the memorandum of the 29th of March, 1869, which cannot, in my opinion, be fairly construed as intended to give the Plaintiff a charge on the fund for unsecured debts due to other persons which he might buy up. Secondly, the Plaintiff does not shew at what time he bought up this bill from *Benjamin;* and it is perfectly consistent with everything he says, that he may have acquired it long after the moneys became distributable, in which case he could not possibly have a charge for it.

I am of opinion, therefore, that the Plaintiff's charge for £88 14*s.* and £25 comes first in order of priority, the charge of *Rubenstein* second, and that of the *Oriental Commercial Bank* third.

SIR G. MELLISH, L.J. :—

I am of the same opinion. I think that the notice given to Messrs. *Hopkinson & Co.* after business hours only operated as a

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notice from the time at which, in the ordinary course of business, it would be opened and read, that is, the next morning. The case is not governed by *Papillon* v. *Brunton* (1), which related to a notice to quit. In that case the relation of landlord and tenant existed between the parties; and it was held that the service of a notice by the tenant at the proper place within the allowed time was sufficient to determine the tenancy, whether there was any person there to receive it or not. But a notice in a case like the present, where there is no relation between the parties, cannot be considered as given until the time when, in the ordinary course of business, it would come before the persons for whom it was left. I am therefore of opinion that the notice of the *Oriental Bank* cannot be treated as premature, and therefore invalid; and I agree that the notices of the Plaintiff, *Rubenstein*, and the *Oriental Bank*, must be treated as having been all given at the same time.

Then, as regards the Plaintiff's securities, I agree with the Lord Justice that the mere renewal of the first bill could not affect the security originally given for the moneys payable under it, and that this security also includes the £25, as being a further advance made by the Plaintiff without notice of any mesne incumbrances; but that the bill which the Plaintiff obtained from *Benjamin* is not included in it. I do not think that the money payable under this bill comes within the fair meaning of the words "any further sum or sums that you may advance, or for which I may be liable to you." I think that the words "liable to you" can only extend to a direct liability arising from a contract between *Forbes* and the Plaintiff, and not to the liability on a bill bought by the Plaintiff in the market. To construe them in the extended sense for which the Plaintiff contends would make the security capable of including sums for which *Forbes* never contemplated giving a security to anybody. But even if the words, on their fair construction, extended to this sum, it would, in my judgment, be fatal to the Plaintiff's case that he has not shewn that this bill came to his hands before the proceeds of the sale of the commission became distributable.

Solicitors: Messrs. *Sydney & Son;* Mr. *T. F. Kent;* Messrs. *Fuller & Saltwell;* Messrs. *F. Richardson & Sadler.*

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(1) 5 H. & N. 518.

In re CONTRACT CORPORATION.

L. JJ.
1871
Dec. 8.

BAKER'S CASE.

Contributory—Infant Transferee—Repudiation—Ratification.

In October, 1865, *C.* purchased shares in a company, and had them transferred to *B.* as a trustee for him, and *B.'s* name was put on the register. In March, 1866, the company was ordered to be wound up. At the time of the transfer *B.* was an infant, and he did not come of age till September, 1867. In December, 1867, *B.'s* name was settled on the list of contributories; and in January, 1868, a call was made, notice of which was sent to *B.* On receipt of the notice *B.* repudiated the shares, and the official liquidator took out a summons to remove his name from the list, but afterwards abandoned the summons. In April, 1871, *B.*, at the request of the official liquidator, wrote a letter authorizing him, in consideration of his not proceeding against *B.* under the call, to use *B.'s* name in taking proceedings against *C.*, the real owner of the shares. Afterwards *B.* took out a summons to have his name removed from the list of contributories:—

Held (affirming the decision of the Master of the Rolls), that the letter of April, 1871, did not operate as a retractation of *B.'s* repudiation of the shares; and that his name must be removed from the list of contributories.

THIS was an appeal from an order of the Master of the Rolls, made in the winding-up of the *Contract Corporation, Limited*, by which he removed the name of *Henry Rutter Baker* from the list of contributories of the company under the following circumstances:—

On the 25th of October, 1865, Mr. *W. L. P. Carter* purchased sixty shares of £100 each in the company from Mr. *F. Heritage* for £300. *Baker* was at that time an assistant to Mr. *Urwick*, a chemist, being of the age of nineteen years, and the transfer was made to him as a nominee or trustee for *Carter*. The transfer was registered on the 25th of November, 1865, and *Baker's* name remained on the register till the company was wound up, which was done by an order made in pursuance of a Petition filed on the 20th of March, 1866.

The sum of £10 on each share had been paid on the allotment of the shares, and a call of £5 was made shortly before the winding-up of the company. Notice of this call was sent to *Baker*, and forwarded by him to Mr. *Urwick*.

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On the 30th of September, 1867, *Baker* came of age.

On the 5th of December, 1867, notice was served on him of a summons to place his name on the list of contributories in respect of the sixty shares. On the 13th of December his name was settled on the list, and the certificate was signed on the 18th of the same month.

On the 28th of January, 1868, a call was made by the official liquidator of £85 per share. Notice of this having been sent to *Baker*, he wrote the following letter to the official liquidator, dated the 11th of February, 1868:—

"I received this morning a notice to pay into the bank a sum of money on account of the liquidator of the *Contract Corporation Company*. I have nothing whatever to do with the affair; I lived with Mr. *Urwick*, chemist, of *St. George's Road, Pimlico*, as his assistant, at the time I signed some papers to take up shares in the company for Mr. *Urwick* and a friend of his living in *Gloucester Street, Pimlico*. I am only a chemist's assistant, out of situation for the last eight months past on account of bad health. I have no means of support whatever, my mother, who is a widow, keeping me. When I went to live with Mr. *Urwick*, in October, 1865 (the year in which the shares were taken up in my name), I had just completed my apprenticeship, and was only nineteen years of age. I merely acted for my employer and his friend. I was told to sign the papers, and I did so. The letters I received from time to time have been forwarded to Mr. *Urwick*, as desired by him. (I enclose a letter of his of recent date). I have no money, and I never had, neither am I at any time likely to have any.

"I remain, &c.,

"*Henry R. Baker*."

On becoming acquainted with the fact of the infancy of *Baker*, the official liquidator, in March, 1868, took out a summons to remove his name from the list, and substitute Mr. *Heritage's* name. The summons was heard before the Chief Clerk in April, 1868, but was eventually abandoned, and no order was made on it.

No further steps were taken in the matter till the month of April, 1871, when the official liquidator obtained from *Baker* an authority in the following terms:—

"*Re The Contract Corporation, Limited.*

"April 15, 1871.

"Sir,—In consideration of your not enforcing the call order in this matter, dated the 28th of January, 1868, against me, I authorize you, as official liquidator of the above company, and on their behalf, and at their cost and risk, and for their benefit, to use my name, or the name or names of my executors or administrators, in prosecuting, compromising, or abandoning, on such terms and in such manner as you may be advised, any suit, action, or other proceeding against *W. L. P. Carter*, of, &c., or such other person or persons as you may be advised, and his and their heirs, executors, or administrators, for the purpose of obtaining an indemnity from them, or compelling them to procure a release to me in respect of, or from all liability on, the shares in respect of which I am settled on the list of contributories of the said company. And I undertake that I, or my executors or administrators, will not interfere in any manner in the conduct of such suit, action, or other proceeding against the said persons or any of them, their or his heirs, executors, or administrators; and that the same shall be left entirely to your control; and that I and my executors or administrators will render you all assistance in my or their power in prosecuting the same. And I further irrevocably authorize and request you, as such official liquidator, to retain any moneys which may be recovered in or by means of such suit, action, or proceedings towards payment and satisfaction of my liability as a contributory in respect of the said shares.

"This authority and undertaking hereby given extends to your successor or successors in office, and the same are subject to the condition of your keeping me and my estate at all times fully indemnified against all costs and expenses in respect of such suit, action, and other proceedings.

"Yours faithfully,

"*Henry R. Baker.*"

In pursuance of this authority the official liquidator caused a bill in Chancery to be filed on the 20th of May, 1871, in the name of *Baker* against *Carter*, praying for a declaration that *Baker* held the shares as a trustee for *Carter*, and for an indemnity against all calls, and all costs and expenses.

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BAKER'S CASE.

On the 20th of June, *Baker* took out a summons to remove his name from the list of contributories; and the Master of the Rolls made the order asked for. From this decision the official liquidator appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the Appellant:—

The question of the Respondent's liability was in fact decided by the abandonment of the summons in March, 1868, and although no formal order was made, the Respondent's name remained on the list, and it is too late now for him to appeal from that proceeding. The transfer of the shares to the infant was not void, but only voidable. The mere fact that the company was in liquidation when he came of age was not conclusive that the contract was injurious to him; the *onus* is therefore on him to shew that he at once repudiated it: *Cork and Bandon Railway Company* v. *Cazenove* (1); *Dublin and Wicklow Railway Company* v. *Black* (2); *Mitchell's Case* (3); *Ebbett's Case* (4); *Holmes* v. *Blogg* (5). But he has, in fact, ratified the contract by the letter of the 15th of April, 1871. He has no cause to complain, for under the terms of that letter the official liquidator is bound to relieve him from all calls in the winding-up; but it is necessary to keep his name on the list in order to proceed against *Carter*, the beneficial owner of the shares.

Mr. *Waller*, the *Solicitor-General* (Mr. *Jessel*) with him, for *Baker*:—

There was no decision on the summons before the Chief Clerk in March, 1868, and the question is, therefore, still open. The Respondent lost no time in repudiating the shares, and he has never withdrawn that repudiation. The letter of the 15th of April, 1871, was signed by him at the request of the official liquidator under a misunderstanding. It does not relieve him from all liability; for if *Heritage*, the transferor, who is now placed on the B. list, is obliged to contribute he will have his remedy against the Respondent. It is, therefore, important to the Respondent that his name should be removed.

(1) 10 Q. B. 935.
(2) 8 Ex. 181.
(3) Law Rep. 9 Eq. 363.
(4) Ibid. 5 Ch. 302.
(5) 8 Taunt. 35.

Sir *R. Baggallay*, in reply.

L. JJ.
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BAKER'S CASE.

SIR W. M. JAMES, L.J.:—

I am of opinion that in this case the order of the Master of the Rolls should be affirmed. The letter that was written by *Baker* shortly after he attained his full age, in February, 1868, was as complete a repudiation as it was possible for any repudiation to be. He said, in effect: "I have nothing to do with the shares; I was a boy of nineteen, and I was induced by my employer to put my name to a piece of paper as something I had nothing to do with, and in respect of which I should never be under any liability." There being that complete repudiation on the part of the infant, and a repudiation accepted by the official liquidator on the part of the company, it would require something very strong indeed to constitute a repudiation of that repudiation. It is, however, said that *Baker* knew that his name was on the list, and yet remained for more than three years without making any application to remove it. But it appears that the official liquidator had himself made the application to have *Baker's* name removed and *Heritage's* substituted for it, and the official liquidator never having obtained any formal decision upon the matter, but having ascertained that the Chief Clerk's opinion was hostile to him, and not being minded to bring it before the Court, has allowed the matter to remain there. It seems to me impossible to treat it as *res judicata* against *Baker*. At all events, no fresh application was made to him; he was not told that, as the official liquidator had failed to put *Heritage's* name on the list instead of his, he must pay the call or make some provision as to it. On the contrary, the official liquidator allowed the call to remain in abeyance, as he had allowed the summons to remain in abeyance. Then came the letter of the 15th of April, 1871, which at first made me incline to hold that *Baker's* name ought to be continued on the list on the ground that he could by no possibility be liable —that he was only remaining on the list for the benefit of the official liquidator, in order to assist him in enforcing the liability of the real owner of the shares. But I have heard no answer to what Mr. *Waller* very properly drew our attention to, that it is not merely between the company and *Baker* a liability may exist, but

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that Mr. *Heritage*, being on the list in Class B. might have a very good claim against *Baker*, as a person who has allowed his name to remain on the list, and who has represented himself as being a shareholder. That being so, it appears to me that *Baker* may now say: "I did not fully understand the nature of that letter, it was never fully explained to me that I should be remaining subject to any liability whatever. I meant to do nothing whatever but to enable the company to use my name, if that could be done without the slightest liability on my part. However, that cannot be done."

I think, therefore, that under the circumstances *Baker* has made the application in time to have his name taken off, and although there may be ground for thinking that this is somebody else's application rather than *Baker's*, yet *Baker* has a right to have his name taken off and be relieved from liability, as the Master of the Rolls has decided.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Official Liquidator: Messrs. *Linklater, Hackwood, & Co.*

Solicitors for Mr. *Baker*: Messrs. *Collyer-Bristowe, Withers, & Co.*

L. JJ.
1871
Dec. 9.

In re WALKER, A LUNATIC.

Presumption of Death—Legatee—Statute of Limitations.

A testator gave a legacy to be equally divided, within twelve months, between the children of *W. P.* who should be living at his, the testator's, death, such sum to be raised out of the property thereinafter given to his executrix for life. He then gave to his executrix certain real and personal estate for her life, and after her death to the children of *W. P.* living at his, the testator's, death. At the testator's death in January, 1847, there were four children of *W. P.* living, but another, *J. T. P.*, had not been heard of since February, 1845, and nothing ever was heard of him afterwards. The executrix paid to the four children, who were known to be living, four fifth shares of the legacy, but did not raise the remaining fifth. In 1851 she became lunatic, and in 1852 the funds, to the income of which she was entitled for life, were transferred to the credit of the lunacy to the account of the lunatic and the children of *W. P.*, and the income was ordered to be applied for her benefit. In 1871 the four surviving children of *W. P.* and the administrator of *J. T. P.* petitioned that the remaining fifth share of the legacy, with interest, might be paid to the four children, or, if not, then to the administrator of *J. T. P.*:—

Held, that, there being no proof that *J. T. P.* survived the testator, the share must be paid to the four children who were known to have survived him; that the manner in which the Court had dealt with the fund took the case out of the statute as to the principal, but that only six years' arrears of interest should be given.

JOSEPH TYNDALL PITT, by will dated the 4th of October, 1845, bequeathed to the children of his deceased brother, *William Pitt*, who should be living at his, the testator's, decease, £1000, to be divided among them, share and share alike; and he directed his executrix to raise it out of the property thereinafter given to her for life. He then gave property, amounting to several thousands of pounds, to *Martha Walker* for life, and after her death to the children of *William Pitt* who should be living at his, the testator's, decease, share and share alike, and appointed *Martha Walker* his executrix.

The testator died on the 24th of January, 1847. *William Pitt* had five children, one of whom, *Joseph Tyndall Pitt* the younger, was born in *Canada* in 1807. *J. T. Pitt* the younger, when grown up, worked at the lumbering trade in *Canada* for some years, during which time he visited his father and his brother and sisters occasionally. From June, 1834, till 1845, he wandered about the *United States*, during which period he wrote to some one or other of his father, brother, and sisters about every eighteen months. The last of his letters was written from *New York* on the 17th of February, 1845, and was received in due course of post by his sister, to whom it was addressed. He was on the best of terms with his relatives, but none of them after this ever received any tidings of him, though inquiries were made and advertisements issued.

In 1848 *Martha Walker* divided four-fifths of the £1000 among the four children of *William Pitt* who were known to have survived the testator; but as nothing was known about *Joseph Tyndall Pitt* the younger, she did not raise the remaining fifth. In 1851 she was found lunatic by inquisition, and by an order made in 1852 the funds bequeathed to her for life, and out of which the remaining fifth of the £1000 was raiseable, were transferred into the lunacy to "The account of *Martha Walker* and the children of *William Pitt*;" and it was ordered that the dividends should be applied in part discharge of the allowance which had been ordered for the lunatic's maintenance.

The present Petition was presented by the three surviving children of *William Pitt*, by the representatives of another who had died since the death of the testator, and by the administrator of *Joseph Tyndall Pitt* the younger, praying for an account of what was due for principal and interest in respect of the unpaid part of the £1000; that the principal might be raised out of the funds given to *Martha Walker* for life, and the interest out of a fund to which she was absolutely entitled; and that the principal and interest might be divided between the three surviving children and the representatives of the one who had lately died; or if the Court did not think it right to make an order to that effect, then that they might be paid to the administrator of *Joseph Tyndall Pitt* the younger.

Mr. *Fry*, Q.C., and Mr. *Bardswell*, for the Petitioners.

Mr. *Dickinson*, Q.C., and Mr. *Methold*, for the solicitor to the suitors' fund:—

The Petitioners must affirmatively prove their title to this share, which they have not done, there being no evidence whether *J. T. Pitt* survived the testator or not: *In re Lewes' Trusts* (1); *Underwood* v. *Wing* (2). But if the title is proved sufficiently, it is barred by the *Statute of Limitations*, the lunatic having enjoyed the income of the fund ever since 1852.

Mr. *Millar*, for the next of kin.

SIR W. M. JAMES, L.J.:—

I think it is clear that the unpaid fifth share of the legacy ought to be divided among such of the four children of *William Pitt*, who are known to have survived the testator, as are living, and the representatives of the one of those four children who has since died. There is no doubt that those four children were included in

(1) Law Rep. 6 Ch. 356.

(2) 4 D. M. & G. 633; 8 H. L. C. 183.

1 Jur N.S. 169

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the class of children of *William Pitt* living at the testator's death. There is a doubt whether *William Pitt's* fifth child was not included, but no evidence has been adduced, nor apparently can be obtained, to shew that he was living at the testator's death, and so included in the class; and it lies upon those claiming under him to shew that he was included. As to the defence founded on the *Statute of Limitations,* the answer, so far as relates to the principal, is, that the Court, acting on behalf of the lunatic, invested the fund to an account, the title of which shewed that the children of *William Pitt* had an interest in it. As regards the income, however, I think that the defence must prevail, and that the Petitioners can only claim interest for six years. The Petitioners must bear their own costs; the costs of the Respondents must come out of the residue of the trust fund after paying to the Petitioners their share of the legacy; and the interest must come out of the funds to which the lunatic is absolutely entitled.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Burton, Yeates, & Hart;* Messrs. *Johnson & Master.*

FARHALL *v.* FARHALL.

[1867 F. 9.]

L. JJ.
1871
Nov. 18.

Creditor—Administration—Loan to Executor.

The executrix of a testator kept an executorship account with a bank, and having a power, under the will, to mortgage the real estate in aid of the personalty, she deposited with the bank the title-deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn by the executrix, and the moneys to a great extent misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against the testator's estate for the difference:—

Held (reversing the decision of *Bacon,* V.C.), that they were not entitled to prove; for that a person cannot, by contract with an executor, acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets.

15 Eq. 177
1 Ch. 749
2 Ch D 743
W N (78) 113
4 App Ca 351
4 Q B D 15
15 Ch D 55
18 Ch D 97
98

THIS was an appeal from a decision of Vice-Chancellor *Bacon* on an adjourned summons allowing a proof by the *London and County Banking Company.*

The testator was a customer of the *London and County Bank*, and at his death, in December, 1871, was indebted to them, on an overdrawn account, to the amount of £732, for which they held the title-deeds of part of his estates. His widow was his executrix, and as such had, by his will, a power to charge his real estate in aid of his personal estate. After the testator's death she kept an account with the bank, headed "*Richard Farhall's* Executors' Account;" and the cheques which she drew on it were signed by her "*Mary Farhall*, for Executors of *Richard Farhall*." This account being overdrawn, Mrs. *Farhall* deposited the deeds of another part of the testator's estates as a security. The result was, that beside the £732 due from the testator at his death, the sum of £1861 14*s.* 10*d.* became due to them on this later account. A decree for administration of the estate having been made in this suit, the bank claimed to prove for these sums, and by consent the estates, the title-deeds of which had been deposited, were ordered to be sold without prejudice to any question. On the 23rd of January, 1869, the claim of the bank to rank as incumbrancers on the proceeds of the sale was allowed by Vice-Chancellor *James* (1). After this the sales were completed, and the result was, that of the £1861 14*s.* 10*d.* a balance of £987 remained unpaid, for which the bank claimed to prove.

It appeared, from Mrs. *Farhall's* own affidavit, that, to a great extent, the moneys drawn out of the bank had been improperly applied; but it was not alleged that the bank had any notice of their not being required and applied for proper purposes.

Vice-Chancellor *Bacon* having allowed the claim (2), the Plaintiff appealed.

Mr. *Fry*, Q.C., and Mr. *Ince*, for the Appellant:—

An executor or administrator can pledge the assets, which is only a way of realizing them. But there is no authority for saying that he can pledge the credit of the estate generally, so as to make the person with whem he contracts a creditor of the estate. The two cases of *Secar* v. *Atkinson* (3), and *Rose* v. *Bowler* (4), are reconciled and explained in *Powell* v. *Graham* (5). The authorities,

(1) Law Rep. 7 Eq. 286.
(2) Ibid. 12 Eq. 98.
(3) 1 H. Bl. 102.
(4) Ibid. 108.
(5) 7 Taunt. 581.

as summed up in *Williams* on Executors (1), support our contention, and *Ashby* v. *Ashby* (2) does not oppose it.

Mr. *Kay*, Q.C., and Mr. *Waller*, in support of the order:—

If this account had been in credit, the balance would have belonged to the testator's estate, and the bank, to their own loss, must have treated the account as an executorship account, and could not have set off the private debt of the executrix against it: *Ex parte Kingston* (3). The executrix, it is admitted, might have mortgaged to its utmost value every chattel forming part of the testator's estate, and, under this will, might have mortgaged the realty to any extent. Why, then, might she not create a general debt which would be less disadvantageous to the other creditors than the charges which she confessedly had power to make? The authorities referred to against us decide no more than this, that the judgment is to be *de bonis propriis*, there being enough to charge the executor personally. *Haynes* v. *Forshaw* (4) decides the present point in our favour. At the worst, we are entitled to stand in the place of any creditors who have been paid with this money.

SIR W. M. JAMES, L.J.:—

In this case it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrows money as executrix, says that she is executrix, and the bank debit her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realize the personal estate and to pledge specific assets, which is one mode of realizing them. Here the executor has also power to pledge the realty; and I have myself, by a former order, given the bankers the full benefit of the charge they had on part of the real estate, and held them not answerable for any devastavit the executrix committed as to the moneys raised by that mortgage. But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is a position supported by no authority

(1) 5th Ed. p. 1605; 6th Ed. p. 1636–8.

(2) 7 B. & C. 444.

(3) Law Rep. 6 Ch. 632.

(4) 11 Hare, 93, 104.

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and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate.

It was urged for the Respondents that they were, at all events, creditors to the extent to which the money was applied in payment of debts, and we were referred to *Haynes* v. *Forshaw* (1). But when that case is fully considered, looking at the whole of it, and not merely at a passage picked out here and there, it only decides that an executor paying money for the estate is entitled to have credit for it, and, if necessary, to stand in the place of the person to whom he has paid it; and the learned Judge goes on to say, that perhaps anybody else who has paid money on behalf of the estate may be able to stand in the place of the creditor who has been paid. I can easily conceive many cases in which this would be just and equitable; but there is nothing in that case to support the contention that, if a man lends money to an executor, who says "I am going to pay debts with it," and the debts are not paid, the lender is to stand in the same place as if the debts had been paid with the money. The bankers, no doubt, took it for granted that the executrix was going to apply the whole of the money which she borrowed from them for the purposes of the estate; but she did not do so; and I am of opinion therefore that their claim fails.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator. The authorities on the subject are summed up by Mr. Justice *Williams* (2): "It seems to have been once considered that wherever an action was brought against an executor or administrator, on promises said to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity. The more modern authorities have, however, established

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(1) 11 Hare, 93, 104.

(2) *Williams* on Executors, 6th Ed. p. 1636.

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that in several instances the executor may be sued as executor on a promise made by him as executor, and that a declaration founded on such a promise will charge the Defendant no further than a declaration on a promise of the testator." But if we look through the different cases which follow that statement, it will be found that in every one the consideration for the promise of the executor was a contract or transaction with the testator. In *Dowse* v. *Coxe* (1) "the declaration stated that a cause depending in Chancery, in which *Thomas Biddle* was a party, was referred to arbitration, and that it was one of the terms of submission that in case either of the parties should die, the death was not to abate the reference." Then one of them died; the reference went on, and an award was made; and then a promise was made by the executor, as executor, to pay according to that award. That was a promise grounded on the reference which had been made in the lifetime of the testator, with an express engagement that his executors should be liable for the performance of the award. Then, in *Powell* v. *Graham* (2), "one count of the declaration stated a promise by the testator in his lifetime, that in consideration the Plaintiff would enter into his service as a nurse and housekeeper, and would continue to serve him till his death, his executor should, after his decease, pay the Plaintiff £20; and then averred the Defendant's liability as executor, and that in consideration thereof the Defendant promised to pay the Plaintiff that sum." There the foundation of the promise by the executor was a previous contract made with the testator. Then, again, Mr. Justice *Williams* says: "So it should seem that a count, averring that the Defendant, as executor, was indebted to the Plaintiff for so much money paid by the Plaintiff to the use of the Defendant as executor, and that in consideration thereof the Defendant, as executor, promised to pay, charges the Defendant in his representative character only." Then he states the reason: "For instance, suppose two persons are jointly bound as sureties, and the one dies, and the survivor is sued, and obliged to pay the whole debt—in such case, if the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and it should therefore seem that he is entitled to sue the executor of the deceased for

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(1) 3 Bing. 20.

(2) 7 Taunt. 581.

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money paid to his use as executor." That shews, no doubt, that a count for money paid for the use of an executor is a good count to charge him in his representative character, when the demand arises in consequence of a contract made with the testator. Then he goes on to say: "But a count, alleging that the Defendant, as executor, was indebted to the Plaintiff for so much money lent by the Plaintiff to the Defondant as executor, and that the Defendant, in consideration thereof, as executor, promised to pay, charges him personally; and the only possible judgment is *de bonis propriis*. And so it is of a count which charges that the Defendant, as executor, was indebted to the Plaintiff for money had and received by the Defendant, as executor, for the use of the Plaintiff." This I take to be the law; and although, as respects money had and received, Lord *Tenterden* and Mr. Justice *Bayley*, in the case of *Ashby* v. *Ashby* (1), said, that if the matter were *res nova*, they should have some doubt whether the Plaintiff might not elect to treat the receipt of the money as an act done by the Defendant in his character of executor, and though it is quite possible that an executor may receive money after the death of his testator, in consequence of some act done or contract made by the testator during his lifetime—in which case it certainly seems somewhat anomalous that the Plaintiff should not be able to recover it out of the assets—yet both those learned Judges considered the point to be settled by the authorities. Mr. Justice *Williams* then goes on to say: "So a count, alleging that the Defendant, as executor, was indebted to the Plaintiff for goods sold and delivered by the Plaintiff to the Defendant, as executor, at his request, or for work done and materials for the same used and provided by the Plaintiff for the Defendant, as executor, at his request, and that the Defendant as executor promised to pay, charges the Defendant in his personal, and not in his representative, character; for such a claim must necessarily be for debts due from the Defendant in his own rights as no goods can be sold to, or work performed for, another in his representative character: *Corner* v. *Shew* (2)." That case shews plainly that no contract can be made with an executor which will not charge him personally, but will charge him *de bonis testatoris*. There were counts for goods sold and delivered, and work and

(1) 7 B. & C. 444.

(2) 3 M. & W. 350.

labour done, not saying for what purpose—in all probability it may have been for the funeral of the testator—yet it was held that on those counts the Defendant could only be charged personally, which shews how strict the law is.

Now, the only doubt that has been raised is from what is said by Mr. Justice *Bayley*, in the case of *Ashby* v. *Ashby* (1), which I cannot help thinking has been misunderstood by the Vice-Chancellor in this case; and I must also say it appears to me to have been misunderstood by the present Lord Chancellor, when Vice-Chancellor, in *Haynes* v. *Forshaw* (2), both of those learned Judges appearing to understand him to have laid down, that if an executor asked a banker or anybody else to pay money for the purpose of paying a debt of the testator, and he did pay the money, that then that would be money paid to his use as an executor. All that Mr. Justice *Bayley* was considering was, whether the count for money paid to the use of an executor, as executor, was a good count; and of course it was a good count if, by any possibility, money could be paid to the use of an executor as executor. I think that what he says is explained by the instance which he puts afterwards, and that he did not mean to say that the money could be money paid to the use of the executor as executor, unless the matter arose out of a contract with, or something done by, the testator. And that is very clearly explained in the same case by Mr. Justice *Littledale*, who does not share the doubts of Lord *Tenterden* and Mr. Justice *Bayley*, but lays down very plainly what, I apprehend, is perfectly clear law, that the debts contracted by the executor cannot come into competition with the debts contracted by the testator in respect of their being paid out of the assets.

I am, therefore, of opinion that the claimants are not entitled to prove for this debt in competition with the creditors of the testator.

Solicitors: Messrs. *Stevens, Wilkinson, & Harries*; Messrs. *Stephens & Matthews*.

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(1) 7 B. & C. 444.

(2) 11 Hare, 93.

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Dec. 4, 5.

6 ChD 772
5 ChD 372-5
17 ChD 721
737
24 ChD 233-5

UPMANN *v.* ELKAN.

[1869 U. 24.]

Forged Trade-mark—Injunction—Agent—Costs—Costs of Respondent.

A firm of forwarding agents in *London* received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in *England*. On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars or to erase the brands :—

Held (affirming the decree of the Master of the Rolls), on a bill for injunction filed by the makers whose brands were forged, that the fact of the agents being merely carriers was no defence to the suit; but that as they had given sufficient information, and offered to erase the brands, they were not to pay costs.

The Appellant gave notice to a Respondent whose costs the Appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs :—

Held, that the Respondent was not entitled to his costs of appearing on the appeal.

THIS was a suit against the holders of goods bearing a fraudulent trade-mark.

The Plaintiffs were cigar manufacturers in *Cuba*, and discovered in June, 1869, that several boxes of cigars, of inferior quality and not made by them, but bearing their brand, had been sent to the *Katharine Docks*, and was there entered in the name of Messrs. *Elkan*, who resided at *Hamburg*, but carried on in *London* the business of agents for forwarding goods consigned to them. These cigars had been consigned to them by Messrs. *Herold & Saenger*, of *Hamburg*, with directions to forward the contents to about twenty different persons in *England*. The Plaintiffs, on making this discovery, applied to Messrs. *Elkan*, who were up to that time, as it appeared on the evidence, not aware that the brands were false. There was some controversy as to what took place on the application by the Plaintiffs, but in the opinion of the Lord Chancellor Messrs. *Elkan* at once offered to give the name of the consignor, and offered either to send back the boxes of cigars or to erase the brands, but refused to disclose the names of the persons to whom the cigars were ordered to be delivered, stating that such information would be

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useless. After the bill was filed, however, they disclosed the names of the persons to whom the cigars were ordered to be delivered.

The Plaintiffs then amended the bill, and made all these persons Defendants. These Defendants all disclaimed any intention to infringe the trade-mark, and the bill was dismissed against all of them except Messrs. *Hamberg & Haar*, who were retained as Defendants.

The Master of the Rolls ordered the Plaintiffs to pay the costs of *Hamberg & Haar*, and also of the Dock Company, who had been made Defendants; and ordered that the consignors should be at liberty to intervene; and that if they did not, the brands of the Plaintiffs should be erased; and that the Plaintiffs should have a lien on the cigars for their costs; as reported (1).

The Plaintiffs appealed; and with the Petition of appeal their solicitors sent to the Defendants *Hamberg & Haar* a letter as follows:—

"The appeal Petitions do not ask for any alteration in the orders made as to your costs; and as your costs will be paid before the Petitions are heard in all probability, it will be unnecessary for you to attend by counsel on the hearing. If you are not paid before the hearing we undertake to pay your costs up to the time of the orders appealed from in order to save the expense of your appearing needlessly on the appeals."

Mr. *Eddis*, Q.C., and Mr. *E. Cutler*, for the Appellants:—

Messrs. *Elkan* were clearly more than mere carriers, and must have been aware of what the goods were. We say that we ought to have had an injunction and costs as against them: *Moet* v. *Couston* (2). Even if we do not get an injunction, we are entitled to relief as against these Defendants, and ought to have our costs. We contend that they did not, before the bill was filed, offer to give us all that we were entitled to.

Mr. *Roxburgh*, Q. C., and Mr. *Bardswell*, for Messrs. *Elkan*:—

Agents cannot possibly tell whether a brand is genuine, and we offered to do all that we could. If we did at first refuse to give the names of the persons to whom the cigars were to be sent, it

(1) Law Rep. 12 Eq. 140. (2) 33 Beav. 578. 10 Jur NS 1012

turns out that the information would have been quite useless; and we did afterwards give it. This is, in fact, an appeal for costs, as to which there is no fixed rule, and on which the Court has exercised its discretion: *Ainsworth* v. *Walmsley* (1).

Mr. *Terrell,* for *Hamberg & Haar,* asked for their costs of the appeal.

Mr. *Eddis,* in reply.

LORD HATHERLEY, L.C.:—

It has been argued that the Plaintiffs were not entitled to an injunction against the Defendants, who had been guilty of no offence, being merely carriers receiving goods, which, though fraudulently marked, were not for their own use, nor to be sold by them for their own benefit, but were received merely for the purpose of transmitting them to the persons to whom they were consigned.

I cannot conceive a doctrine more dangerous or mischievous, or more fatal to the authority of the Court with respect to trade-marks. If that argument prevailed, any persons being abroad, as was the case in this instance, and minded to commit frauds upon an English trade-mark, could easily do so by sending their different consignments together to persons in the position of the Defendants, who appear to be respectable agents and warehousemen, thereby committing an injury in a manner most convenient for themselves, and very mischievous to the person entitled to the benefit of the trade-marks.

The Master of the Rolls seems to have said—and I entirely agree with him—that there would be a right to an injunction if the Defendants had not made an offer of redress when first the complaint was made; and this appeal is brought forward almost as an appeal for costs, to which, in fact, the argument has been mainly, if not entirely, addressed. If, however, I thought that the Plaintiffs had not, really and substantially, obtained all they had a right to obtain, or that they might be again exposed to be damnified in this same manner by the Defendants, I think it would have been my duty to have granted the injunction instead of taking the intermediate course which the Master of the Rolls has taken.

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(1) Law Rep. 1 Eq. 518.

The Plaintiffs are the undoubted owners of the trade-mark, and have given sufficient evidence that these goods, which are impressed with the trade-mark, are not theirs. [His Lordship then commented on the evidence, as leading him to that conclusion.]

It was the business of Messrs. *Elkan*, the moment the complaint was made, to give all proper information. They say they were innocent, and the Master of the Rolls has held them to be innocent, and I hold them to be innocent of any part of this contrivance on the part of the consignor; but still it was their duty, from the first moment, to give all the information they possibly could, and to offer all redress, and the question is whether they did so. No doubt they declined giving the names of the persons to whom the goods were addressed, but they gave the name of the consignor, saying that the goods were addressed to about twenty different people, and that they did not at present see why they should give the names of these twenty people. That, I think, was an error on their part, but suppressing the names of the consignees would be a matter of small importance if they did on that occasion offer to do one of two things, either to send the goods back, which would be no redress, because it would enable the consignors to repeat the fraud, or to erase the trade-mark altogether. If they made these offers before the bill was filed, it really seems to me that they, as innocent holders, did all that they need do. If the trade-mark was erased, the goods could not go with the trade-mark to the persons to whom they were directed, and the Plaintiffs could do nothing against parties who would not be properly parties to the suit. [His Lordship then commented on the evidence, and expressed his opinion that the Master of the Rolls was not wrong in coming to the conclusion that the evidence did prove that the offer was made before the bill was filed.]

As to the persons to whom the goods were to be sent, it is clear that there was a mistake in making them Defendants. There was no proof that they ordered the goods, and the goods never reached them in any way whatever. It seems that eighteen of them were dismissed, but as to the two who were retained, I cannot say that they were justified in appearing on this appeal,

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when an offer had been made to pay them their costs then and there. The proper order is to dismiss the petition of appeal with costs as to the Defendants Messrs. *Elkan*, and without costs as to the other Defendants.

Solicitors for the Plaintiffs: Messrs. *Lumley & Lumley.*
Solicitors for Messrs. *Elkan:* Messrs. *Le Riche & Son.*
Solicitors for Messrs. *Hamberg & Haar:* Mr. *S. Scott.*

L. C.
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Dec. 5, 6.

McILWRAITH *v.* DUBLIN TRUNK CONNECTING RAILWAY COMPANY.

[1869. M. 171.]

Company—Scripholder—Shareholder—Removing Name from Register.

The Plaintiff applied for scrip in a company, the prospectus of which stated that on registration of the scrip, of which due notice would be given, the £50 scrip certificates would be divided into shares of £10 each. One hundred scrip certificates were allotted to the Plaintiff, and he paid the deposit thereon. The company afterwards brought an action against him for money due on calls in respect of 500 shares, to which he pleaded that he was not a shareholder. He afterwards attended a meeting of the company, and signed proxy-papers for votes at another meeting. His name had been placed on the register as a holder of 500 shares, but no notice of this was given to him until long afterwards:—

Held (affirming the decree of the Master of the Rolls), that the Plaintiff was entitled to have his name removed from the register of shareholders:—

Quære, whether he could, as against creditors of the company, have contended that he was not a shareholder.

THIS was a suit for the purpose of having the name of *John McIlwraith*, the Plaintiff, taken off the list of shareholders in the *Dublin Trunk Connecting Railway Company.*

The company was incorporated, in 1864, by 27 & 28 Vict. c. cccxxi It was provided, by sect. 7, that the number of shares into which the capital of the company should be divided should be 25,500, and the amount of each share £10; and that no share should be issued by the company, or vest in the person accepting the same, until not less than £20 per centum on the nominal amount thereof should have been paid thereon; and, by sect. 9, that it should not be lawful for the company to issue any share, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth part of the amount of such share should have been paid up thereon.

In the spring of 1865, the company, by their directors, issued a prospectus stating that the capital was £255,000, in 5100 provisional scrip certificates to bearer of £50 each—£1 to be paid on application, and £4 on allotment; and stating, among other things, that "on registration of the scrip, of which due notice will be given, the certificates for £50 will be divided into five shares of £10 each."

On the 5th of June, 1865, the Plaintiff paid a deposit of £150 to the bankers of the company, and on the same day signed the following printed application for an allotment of 150 scrip certificates:—

"Having paid to your bankers the sum of £150, I hereby request that you will allot me 150 scrip certificates, of £50 each, in the *Dublin Trunk Connecting Railway Company*; and I agree to accept such scrip certificates, or any less number that may be allotted to me, and to pay the further sum of £4 per certificate due upon such allotment."

In answer to his application, Plaintiff received a letter informing him that 125 scrip certificates had been allotted to him, the scrip certificates being each in the following form, after the heading:—

"The holder of this certificate for £50 having paid a deposit of £5, is entitled, on registration, to have this certificate divided into five shares of £10 each in the *Dublin Trunk Connecting Railway Company*, subject to the provisions of the above Act."

The Plaintiff then paid a further sum of £475 to the bankers of the company.

On the 16th of August, 1865, a circular was sent to the scrip-holders, giving them notice that the shares did not vest in the allottees until not less than 20 per cent. of the nominal amount thereof should have been paid thereon, and suggesting that they should pay £1 a share if they meant to attend the ensuing meeting of the company. The Plaintiff denied the receipt of this circular, but he did, in 1865, receive two letters from the company, applying for money as due for calls upon shares.

The Plaintiff took no notice of these letters, and never applied to have the scrip registered, or for shares. The register of shares was made and sealed in August, 1865, but, for some reason not given, the Plaintiff's name was not placed on the register until January, 1866, when he was registered as the holder of 500 shares. He appeared to have sold twenty-five of his 125 scrip certificates.

In March, 1866, the company brought an action against the Plaintiff for calls on 500 shares. He appeared, and pleaded, with other pleas, that he never had been and was not then a shareholder. The company filed a replication, but did not proceed further with the action.

On the 1st of May, 1866, the Plaintiff attended an extraordinary general meeting of the company, convened by the directors, in which the chairman of the company was in the chair. The Plaintiff signed his name in the attendance-book of the meeting, the list being headed, "Shareholders present at Extraordinary General Meeting," and he signed as holding 500 shares. The Plaintiff stated that he attended the meeting supposing it to be a meeting of persons interested in compelling the directors to account to the scrip-holders; and that when the chairman announced that no scrip-holder who had not become a shareholder would be allowed to take any part in the proceedings, he (the Plaintiff) took no part, and remained as a spectator merely.

The Plaintiff in 1867 signed two proxy-papers for voting at meetings, in which papers he was styled a proprietor; but he declared that he never intended to acknowledge himself as a shareholder, and signed the papers at the request of one *Williams*, who, as the Plaintiff understood, was then desirous of compelling the directors to account to the scrip-holders.

On the 14th of November, 1867, the Plaintiff received a letter from the company announcing a call of £2 per share, and stating that the Plaintiff was registered as holder of 500 shares. This the Plaintiff stated to be the first intimation he had received that he was registered as a shareholder. And it did not appear that the company had ever given general notice of their intention to register the shares.

On the 18th of March, 1868, the Plaintiff received a letter from the company demanding £1125 for calls, and containing a statement that he was placed on the register as holder of 125 shares besides his other shares—a claim which was afterwards abandoned.

In answer to this letter, on the 20th of March, 1868, the Plaintiff's solicitors wrote to the company a letter denying that he was a shareholder in the company, and offering to accept service on his behalf of any process they might issue.

The company proved abortive.

On the 28th of May, 1869, the Plaintiff's solicitors wrote to the company, and required the Plaintiff's name to be erased from the list of shareholders. On the 23rd of June, 1869, the Plaintiff filed the original bill in this suit against the company and the directors, stating in partas above stated, and that he was in jeopardy of writs of *scire facias* levied upon by judgment creditors and otherwise as long as his name remained on the register of shareholders, and praying that his name might be erased from the register, and that the company might be restrained from proceeding with their action, or taking any other proceedings at law against the Plaintiff.

The Vice-Chancellor *James*, in whose Court the bill was filed, granted an interim injunction restraining the action, and expressed his opinion to be against the right of the company to retain the Plaintiff as a shareholder.

The suit was afterwards transferred to the Court of the Master of the Rolls, before whom it came to be heard on motion for a decree.

The Master of the Rolls concurred in the view of Vice-Chancellor *James*, and ordered the name to be erased, and the Defendants appealed.

Mr. *Townsend* (Mr. *Southgate*, Q.C., with him), for the Appellants:—

We submit that the Act gave to the directors the option of registering the scrip-holders as shareholders. The holder is not to apply, but the company can register when they think fit. The facts in *Eustace* v. *Dublin Trunk Connecting Railway Company* (1)

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(1) Law Rep. 6 Eq. 182.

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were very different: *East Gloucestershire Railway Company* v. *Bartholomew* (1) applies. Here the Plaintiff had never parted with his shares; he knew he was on the register, and he acted as a shareholder. He still holds the scrip certificates, and he might at any time, if the company had been prosperous, have come in and registered. Can he keep the company for ever in this state, and play fast and loose in this manner? His plea to the action was good, because at the time when the call was made he was not on the register; but that does not affect this question.

Mr. *Locock Webb* (the Solicitor-General (Mr. *Jessel*) with him):—

We contend that the Plaintiff did not contract to take shares; that he was registered without his knowledge or consent; and that he has never accepted the shares, or acquiesced in the registry. He did not pay particular attention to the list or proxy-papers which he signed, and thought that he was acting as a scrip-holder, and advancing the claims of the scrip-holders against the directors. He always denied that he was a shareholder, and the company have never ventured to proceed with their action. The company has not been wound up, and this is not a proceeding by a creditor seeking to make a shareholder liable, but a mere question of contract or none between the Plaintiff and the company. *Eustace* v. *Dublin Trunk Connecting Railway Company* (2) is a clear authority in our favour. In *East Gloucestershire Railway Company* v. *Bartholomew* the Defendant had entered into a subsequent contract.

Mr. *Townsend*, in reply.

LORD HATHERLEY, L.C.:—

This case has been very ably argued on both sides; and I wish to be understood as having come to no conclusion as to what would be the effect of some omissions and of some commissions on the part of the Plaintiff if the contest were with a third party—with creditors, for instance—or were after a winding-up.

I think that the only thing I have to consider in this case is the position of the Plaintiff with the company. And, first, did he originally, and by his application, enter into a contract to take shares? Secondly, if no such contract was then entered into, has his

(1) Law Rep. 3 Ex. 15.

(2) Law Rep. 6 Eq. 182.

subsequent conduct been such as to create such a contract, so that he must thenceforth be treated as a shareholder of the company?

Now, I have no doubt whatever as to the decision in *Eustace* v. *Dublin Trunk Connecting Railway Company* (1), which related to the same company. The original contract was simply a contract which would entitle the holder of a scrip certificate at some future period to apply for shares, and this was the privilege for which he paid his deposit, subjecting himself to no liability.

Whether the directors had power to start the company, and to issue shares in any other way, we need not now inquire; but there was a good reason why they should issue these scrip certificates in this form, and that was, that the Act of Parliament provided that the shares should not be issued until 20 per cent. was paid on the nominal amount.

The learned Judges seem, in the case of *East Gloucestershire Railway Company* v. *Bartholomew* (2), to have agreed with the arguments addressed to them by counsel, that the provision with regard to the non-issuing of shares was intended merely for the protection of the public. Still, it would have been the duty of the directors to obey the provisions of the Act, and all they could do, if they wanted to raise funds, was to issue scrip certificates by which, for a less price paid, they would sell the right of being the first claimant for shares as soon as the directors gave notice that they were prepared to register shares. Of course, until they had given this notice, they would not be able to issue these shares, because the scrip-holders would have a right to say that these shares were appropriated, and on payment of the additional 10 per cent. to come in and ask to have the shares allotted to themselves. The scrip-holders had purchased this right, though of course they could not for ever keep the company in a state of suspense as to whether they meant to be registered or not.

It must be a necessary consequence of such a contract that, when due notice of registration is given, with a reasonable time for holders to come in, and they do not come in within that reasonable time, then the company must have power to disregard the claims of the holders of scrip certificates who did not apply to be registered at the time which was appointed.

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(1) Law Rep. 6 Eq. 182.

(2) Law Rep. 3 Ex. 15.

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It did, certainly, strike me as singular that the Plaintiff never offered to surrender his scrip certificates; but still, as was held in *Eustace* v. *Dublin Trunk Connecting Railway Company* (1)—a decision which was followed by Vice-Chancellor *Stuart* in *In re Asiatic Banking Corporation* (2), and which was also followed by the Master of the Rolls in this case, and which I entirely adopt—I think that there was originally no contract on the part of the Plaintiff to take any shares in the company, but simply a contract to put himself in a position of being entitled to come in and take shares whenever he should receive due notice that registration was about to take place.

That notice he never received, nor was there any public or general notice that on a certain day he must come in to be registered, on pain of forfeiting the advantages of his scrip certificates, together with the amount he had paid on purchasing those scrip certificates. Some one, however, apparently under the order of the directors, did put the Plaintiff's name down for 500 shares, and an action was brought against him for calls in respect of these 500 shares, to which he pleaded that he had never been a shareholder, and was not then a shareholder; the company replied, and in that state the action has remained ever since. He set the company completely at arm's length by denying that he was a shareholder, though it may be that the directors, knowing that he had not been registered when the call was made, thought that defect sufficient, and took no further steps in the action. Still it must not be forgotten that that action was still pending, and that plea still undetermined.

[His Lordship then commented on the acts of the Plaintiff, and said that they were extraordinary, but might be explained, as the Plaintiff did explain them, by saying that he considered himself to be acting as a scripholder only. Still the acts were very strong evidence, and his Lordship doubted if the Plaintiff could have escaped the consequences of those acts if the contest had been between him and third parties—such as creditors of the company, who might have seen his name on the register and relied upon that, and upon his acts in attending meetings and signing proxy-papers. But this was a contest between the Plaintiff and the company, who had to

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(1) Law Rep. 6 Eq. 182.

(2) Law Rep. 9 Eq. 236.

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make out that there had been an agreement between them that the Plaintiff would take shares; and the company must have been aware that a very short time before these acts he had formally pleaded that he was not a shareholder.]

It was urged at the bar that if the company had gone on prosperously the Plaintiff might at any time have demanded to be registered as holder of the 500 shares. But the company might have refused to accede to this demand, and have relied upon his plea that he was not a shareholder.

It must be remembered that we have no clear account of how his name was placed upon the register, though it is clear that there was no acquiescence on his part, that his plea remained on record, and that the company have not chosen to proceed with their action, and to fix him as a shareholder.

As to his delay in filing this bill after he had, in 1867, discovered that his name had been placed on the register, I think that that is entirely covered by the correspondence which took place in 1868, when, in answer to an application for calls, his solicitor at once wrote to deny his being a shareholder. I do not think the circumstance of his having allowed rather more than a year after that to pass, before he filed his bill to be relieved, ought to be enough to allow the company to maintain any contract between them.

I think, therefore, on the whole, that the Master of the Rolls has come to a sound conclusion, and that I must dismiss this appeal with costs.

Solicitor for the Plaintiff: Mr. *C. W. Dommett.*

Solicitors for the Defendants: Messrs. *Hurford & Taylor.*

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Nov. 23, 24;
Dec. 10, 15.

ORIENTAL FINANCIAL CORPORATION *v.* OVEREND, GURNEY, & CO.

[1868 O. 6.]

Principal and Surety—Giving Time.

17 Eq 209
5 P.C 250
1 QBD 542

The holder of a security who agrees with the principal to give time to the surety by so doing discharges the surety.

The holder of a security is, in dealing with the security, affected by knowledge acquired after taking the security as to which of the parties liable on the security is the principal and which is the surety.

A financial company, by agreement with an agent, accepted bills of exchange which were discounted for the agent by a discount company, the agent guaranteeing payment. The discount company were not at the time aware of the relations between the acceptors and the agent, but were informed before the bills matured that the agent was principal, and that the acceptors were sureties. After this the discount company agreed with the agent not to press the acceptors for payment until certain other bills became due:—

Held, that the acceptors were thereby discharged.

Decree of *Malins*, V.C., reversed.

Owen v. *Homan* (1) and *Ex parte Graham* (2) observed upon.

Affirmed LR 7 HL 349

THIS was a suit by the *Oriental Financial Corporation* to restrain an action at law on certain bills of exchange for £10,000 which they had accepted; their ground being, first, that the bills had, in fact, been paid; and, secondly, that they were, to the knowledge of the holders, merely sureties, and that the holders had given time.

James McHenry, as agent of the *Atlantic and Great Western Railway Company*, in 1864 applied to the Plaintiffs, the *Oriental Financial Corporation*, to accept bills to the amount of £100,000, which the Plaintiffs agreed to do at a commission of 4 per cent. Accordingly bills to the amount of £100,000 were drawn on the Plaintiffs by one *Léon Lillo*, a banker at *Paris*. They were all dated in July, 1864, and were for twelve months. The Plaintiffs accepted the bills, which were handed over to *McHenry*, who proceeded to get them discounted, part of them being discounted by

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(1) 3 Mac. & G. 378.

(2) 5 D. M. & G. 356.

Overend, Gurney, & Co., to whom *McHenry* guaranteed payment. When the bills became due fresh bills for the same amount were drawn and accepted, similar in all respects to the first set, except which they were six months' bills, and that the name of the drawer was *Emile Deschamps;* and these bills were substituted for the others. This set of bills became due in January, 1866, and when they became due *McHenry* paid or provided for £82,000, leaving a balance of £18,000, of which the £10,000 in question in this suit was provided for by renewed bills for £2000, £2000, £3000, and £3000 respectively. They were for three months, and were dated the 3rd of January, 1866, drawn by *Emile Deschamps* on the Plaintiffs, and accepted by the liquidators of the Plaintiffs, who had, on the 1st of November, 1865, passed a resolution for a voluntary winding-up. The bills were then handed over to *McHenry*, and were taken by *Overend, Gurney, & Co.* in renewal of former bills to a similar amount; *McHenry* giving to *Overend, Gurney, & Co.* a written guarantee that he would indemnify them for all loss which they might incur by so doing, and that in the event of the bills not being duly paid at maturity *McHenry* would pay the amount of the bills on demand; and he further gave the guarantee of the *Atlantic and Great Western Railway Company.*

The bills became due on the 6th of April, 1866, and were dishonoured.

Overend, Gurney, & Co. had neither notice nor knowledge, at the time they received the bills, whether they were accepted by the Plaintiffs for valuable consideration or not, nor which of them, the Plaintiffs and *McHenry*, was in advance to the other, nor what was the state of accounts between them.

But on the 9th of April, 1866, Mr. *Farmer*, one of the solicitors of the Plaintiffs, called at the place of business of *Overend, Gurney, & Co.*, and there saw their managing director and their secretary, and stated to them that the bills had been accepted by the Plaintiffs for the benefit of *McHenry*, and that they treated him as primarily liable.

On the 27th of April *McHenry* (who had other transactions with *Overend, Gurney, & Co.*, and had, on the 13th of March, deposited with them certain shares in the *Atlantic and Great Western Railway Company*, as to the object of which there was a dispute) called upon *Overend, Gurney, & Co.*, and proposed to them to discount certain other bills, and to apply the balance of £1000, which would arise from that transaction, in reduction of the £10,000, and gave them thirty-two bills of £1000 each drawn by *Léon Lillo* upon the *Bank of London*, and requested them not to press the Plaintiffs for payment of the bills. There was a dispute as to what was the actual agreement made on this occasion between *Overend, Gurney, & Co.* and *McHenry;* but in the opinion of the Lord Chancellor, *Overend, Gurney, & Co.* agreed to hold over the bills which the Plaintiffs had accepted, until the bills drawn by *Léon Lillo* came to maturity, which would not be for some months afterwards. At the same time a document was made out and assented to, which, as the Defendants contended, was merely a statement of account as between *McHenry* and *Overend, Gurney, & Co.*, but as the Plaintiffs contended, amounted to a discharge of the bills for £10,000.

In May, 1866, *Overend, Gurney, & Co.* stopped payment, and shortly afterwards went into liquidation. No further steps were taken in reference to the bills till the 5th of November, 1867, when one of the liquidators of the Plaintiffs received a letter from the liquidators of *Overend, Gurney, & Co.*, claiming the balance of £9000, together with interest on the bills. A correspondence thereupon took place, and on the 28th of February, 1868, *Overend, Gurney, & Co.* commenced an action against the Plaintiffs for £11,536 9*s.* 8*d.*, being the amount claimed for principal and interest on the four bills, together with a balance claimed upon a fifth bill.

The Plaintiffs then, on the 10th of March, 1868, filed their original bill in this suit against *Overend, Gurney, & Co.*, and *McHenry*, praying a declaration that the Plaintiffs were not liable on the four bills for £10,000, and that the bills might be delivered up to be cancelled, and that the proceedings at law might be restrained. On the 23rd of April, 1868, an order was made by arrangement restraining the action, on a submission by the Plaintiffs to abide by any order the Court might make for payment of whatever might be found due on the bills.

The suit then came on for hearing on motion for decree before the Vice-Chancellor *Malins*, who held that the Plaintiffs

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7 H.L. 351

were bound to pay the bills, and must pay the costs of the suit (1).

The Plaintiffs appealed.

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(1) 1871. June 10. WN(1871)143.

SIR R. MALINS, V.C., after stating and discussing the facts of the case, continued:—

The Plaintiffs, then, rest their case on three points: first, security given to the Defendants on the 13th of March; secondly, that the transactions of the 13th of March and the 27th of April amounted to actual payment; and thirdly, if not, that the result of the transaction was to give time to the principal debtor, *McHenry*, which discharged the Plaintiffs who were sureties.

Assuming these bills to have been accommodation bills, and that *McHenry* was, as he is treated by the Plaintiffs, the principal debtor, there is no doubt as to the law of the case. It is settled by a long line of authorities that wherever there is a debt by a principal debtor and a surety, and the creditor enters into a binding contract to give time to the principal debtor without the consent of the surety, such giving of time to the principal is a discharge of the surety. It is not necessary to go minutely into the cases; *Davies* v. *Stainbank* (6 D. M. & G. 679) was much relied upon by Sir *Roundell Palmer* in his argument, but I do not find in it any new law whatever. It was really a discussion whether the parties had given time or not, the law having long been clearly settled in the manner I have stated. The long judgments of the Lords Justices in that case, particularly of the Lord Justice *Knight Bruce*, only state the grounds on which he arrives at the conclusion that *Stainbanks*, who were the holders of the bills of exchange which were accepted by the Plaintiff in equity for the accommodation of other parties, had given the principal debtor time, and had thereby discharged the surety; which is the conclusion arrived at. *Pooley* v. *Harradine* (7 E. & B. 431)(a) is a case of precisely the same nature, and only proceeded upon the general law. *Bailey* v. *Edwards* (4 B. & S. 761) is also a strong instance of the same kind. There a term of two years was given by the creditor, who accepted a deed which had been executed by the principal debtor; that was done without the consent of the surety, and it was held to be a discharge of the surety. *Ewin* v. *Lancaster* (13 W. R. 857) is another instance of the same kind. *Oakeley* v. *Pasheller* (4 Cl. & F. 207) is to the same effect. In all these cases time was given. But it is perfectly clear that in order to discharge by giving time there must be a positive contract to give time which is binding on the creditor. That is very distinctly laid down by Lord *Eldon* in *Samuell* v. *Howarth* (3 Mer. 272), a celebrated case which, though not cited at the Bar, is cited in almost all the cases which have been referred to. I will read this rule as laid down by him (3 Mer. 278). "The rule is this: that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety. That is, if time be given by virtue of a positive contract between the creditor and the principal — not where a creditor is merely inactive. And in the case put the surety is held to be discharged, for this reason: because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether

(a) Eq. C. 8 Jur. N.S. 408

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Jason Smith*, for the Appellants:—

Whether these were accommodation bills or not makes no difference, as the doctrines of principal and surety would apply in either

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he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract."

Now, in the present case, it is not even alleged in the bill that there was any contract to give time to *McHenry*, and *McHenry* throughout the whole of the argument is treated as the principal debtor. The only agreement to give time which is in evidence is, that instead of giving time to *McHenry*, it being a great object plainly to *McHenry* that this company, which had accepted bills under an arrangement with him, should not be unduly pressed, he, for his own purposes, requested *Overend, Gurney, & Co.* not to press the Plaintiffs. [His Honour then referred to the evidence bearing upon this point, and continued:—] The evidence, in my opinion, entirely fails to prove that time was given to *McHenry*. It is not proved, or even alleged, that there was so much as a verbal promise to suspend the right of action against him; and even if a verbal promise had been alleged it would not have been binding.

In *Philpot* v. *Briant* (4 Bing. 717) it was decided that a verbal promise to give time, which was not binding, did not discharge the surety. [His Honour then read the marginal note and parts of the judgment of the Lord Chief Justice *Best* in that case (4 Bing. 720)]. There must, therefore, be a binding contract, suspending the right of action.

The Defendants contended, first, that these bills were not, in the proper sense of the words, accommodation bills; secondly, that the transaction of the 27th of April was merely giving additional security, which is not a discharge of the surety; and thirdly, that the understanding that the bills should be held over was merely giving time to the surety, not to the principal debtor, which never discharges the surety. I am of opinion that the Defendants were right on all these points. I need not enter into it further, because I had occasion in *Ex parte Swan, In re Overend, Gurney, & Co.* (Law Rep. 6 Eq. 356), to consider what was an accommodation bill, and I came to the conclusion, for the reasons there stated, that where there is an account between the parties and bills are accepted, those were not strictly accommodation bills. I do not mean to decide the point, but I think it open to very grave doubt whether, considering these bills were accepted for value, 4 per cent. commission, and the other circumstances (I must assume as against the Plaintiffs that all the other arrangements were satisfactory to them), these bills can, in any sense of the word, fairly be held to be accommodation bills. However, I do not decide the case on those grounds.

As it is settled that an agreement to give time to the principal debtor, without the consent of the surety, is a discharge of the surety, so it is also equally clearly settled that giving additional security to the creditor by the principal, without the knowledge of the surety, is not a discharge. That was distinctly laid down by the Court of Queen's Bench in case. The money had been advanced to *McHenry* by *Overend, Gurney, & Co.* on the former bills for which the present bills were substituted. If *McHenry* had been a stranger, the agreement with him might not affect the rights of the parties; but, in fact, he was

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the case of *Pring* v. *Clarkson* (1 B. & C. 14), where Lord *Tenterden*, in giving judgment, says: "If time be given to the acceptor the other parties to the bill are discharged; but in no case has it been said that taking a collateral security from the acceptor shall have that effect. Here the second bill was nothing more than a collateral security." The second bill had been given by the surety without the knowledge of the principal.

In *Wyke* v. *Rogers* (1 D. M. & G. 408) Lord *St. Leonards* laid it down that taking a new promissory note from the principal does not discharge the surety, if the remedies against the surety are preserved. In *Twopenny* v. *Young* (3 B. & C. 208) it is also decided that the creditor taking from the principal additional security could not amount to a discharge. Therefore if any additional security was given by *McHenry* on the 27th of April, 1866, it is, upon the authorities, perfectly clear that taking that additional security, unaccompanied as it was by any binding contract to suspend the right of action against *McHenry*, could not have the effect of discharging the surety.

I also entirely concur with the opinion of many learned Judges—indeed, I may say, almost every Judge who has expressed an opinion on this subject—that this doctrine, of discharging the surety by giving time to the principal, is not a doctrine founded upon high principle. It is a doctrine which, as I have had an opportunity of learning from other Judges, is not generally acquiesced in. It has, in many of the judgments I have referred to, been lamented by the Judges that it had become a rule; but it has become so fixed a rule that it is impossible to interfere with it. Still I think it is equally clear that it is not a rule which is to be extended, and I entirely concur in the observation of Sir *Anthony Hart* in *Hulme* v. *Coles* (2 Sim. 12), that the principle of discharging a surety by giving time to the creditor is a refinement of a Court of Equity, and that he would not refine upon it.

Then the last point contended for by the Defendants was, that the principle does not apply to the case of giving time to a stranger to the bills, which was the position of *McHenry*. In support of this view *Frazer* v. *Jordan* (8 E. & B. 303) was cited, and I think it is a very material authority in the present case. [His Honour then stated the facts of that case, and read a portion of the judgment of Mr. Justice *Coleridge*]. The decision in that case was, therefore, that no arrangement with a stranger can have the effect of discharging the surety.

I am of opinion, on all these grounds, first, that these bills were not, in the proper sense of the term, accommodation bills at all; secondly, that even if they had been, neither the arrangement of the 13th of March, 1866, nor that of the 27th of April, amounted to payment or giving time to the principal debtor. There was no contract whatever to give time to *McHenry*, if I am to treat him as the principal debtor. They were just as much at liberty on the 28th of April to sue him at law as if the statement of account of the 27th of April had not been made. It was, in my opinion, a mere statement of account; there was no time given and certainly no payment.

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the principal, and known at the time to be such, which is quite sufficient to bring in the doctrine as to giving time: *Oakeley* v. *Pasheller* (1). Even at common law the Courts will look to the real relation between the parties: *Ewin* v. *Lancaster* (2). It is clear that the transaction, though nominally a giving time to the surety, was in effect a giving time to the principal, and by so doing the rights against the surety have been lost: *Davies* v. *Stainbank* (3); *Pooley* v. *Harradine* (4); *Bailey* v. *Edwards* (5). Moreover, we contend that, according to the arrangement of the 27th of April, these bills must be taken to have been discharged.

Mr. *Cole*, Q.C., and Mr. *Ferrers*, for *Overend, Gurney, & Co.*:—

We must look to the original loan and consider what were the relations of the parties at that time; and it is clear that the Plaintiffs were treated as principals. The only notice which can bind them is the notice they had when they discounted the bills. The parties cannot, after getting the money, turn round and declare that the relation between them was different: *Harrison* v. *Courtauld* (6); *Manley* v. *Boycot* (7). Precisely the same point arose in *Ex parte Graham* (8) and in *Strong* v. *Foster* (9). *Pooley* v. *Harradine* merely followed former cases, and the *dicta* in *Bailey* v. *Edwards* were extrajudicial. Giving time to the surety is very different from giving time to the principal, and to hold that it amounts to the same thing would be an extension of the rule, which the Court would certainly not desire. The agreement to give time must be clearly proved: *Hulme* v. *Coles* (10); *Wyke* v. *Rogers* (11); *Ex parte Harvey* (12). The Plaintiffs have no

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On these grounds, therefore, I am of opinion that the Plaintiff's case has wholly failed, and that they are bound to pay the bills. There must, therefore, on the undertaking given on the 8th of April, 1868, be a reference to ascertain what is due for principal and interest on the bills, and there must be an order for the Plaintiffs to pay the amount of the bills under their undertaking; and of course they must pay the costs of the suit.

(1) 4 Cl. & F. 207; 10 Bli. 548.
(2) 12 W. R. 857.
(3) 6 D. M. & G. 679.
(4) 7 E. & B. 431. 3 Jur. N.S. 1408
(5) 4 B. & S. 761.
(6) 3 B. & Ad. 36.
(7) 2 E. & B. 46. 17 Jur. 1118
(8) 5 D. M. & G. 356.
(9) 17 C. B. 201.
(10) 2 Sim. 12.
(11) 1 D. M. & G. 408.
(12) 4 Ibid. 881.

equity; if they have any case, it is for the jury to consider in the action at law. It would be a great hardship on bill discounters if they were obliged to keep in mind all the equities of the parties to the bills, and could not deal as they choose with the bills they hold. Moreover, no time was given to *McHenry*. What was to prevent the holders from suing him on his guarantee? If *McHenry* had indorsed the bills it would be different, but he is a mere stranger to the bills, and no agreement with him can affect the acceptors. In fact, neither *McHenry* nor the Plaintiffs are principals; the Railway Company are the principals.

Sir *Roundell Palmer*, in reply.

Dec. 15. LORD HATHERLEY, L.C.:—

In this case the Plaintiffs seek to be relieved from their liability on four bills of exchange amounting together to £10,000, upon two grounds: first, that *McHenry*, to whom they gave the bills, and who procured them to be discounted by *Overend, Gurney, & Co.*, afterwards settled an account with *Overend, Gurney & Co.*, by which account *Overend, Gurney, & Co.* discharged and released everybody concerned from all liability upon the bills. Secondly, that even if that were not so, yet the Plaintiffs ought to be relieved upon the principle that time was given to *McHenry*, he being, to the knowledge of *Overend, Gurney, & Co.*, at the time when the arrangement was come to, primarily liable, and the Plaintiffs being liable only in the nature of his sureties.

Now, as regards the first ground, it appears to me clear that the bills were not paid or intended to be paid by the arrangement which was come to on the 27th of April, 1866.

As regards the circumstances connected with the bills, there seems to be, I think, no dispute of fact. [His Lordship then stated the facts of the case, and said that the agreement of the 27th of April between *Overend, Gurney, & Co.* and *McHenry*, was, that during the currency of the bills drawn by *Lillo* they would hold over the bills accepted by the Plaintiffs which were then payable, and on which the guarantee of *McHenry* had accrued.]

Now, the real question is, whether this case falls within the

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authorities by which it has been long settled that, if time is given to the principal, the surety is discharged. It was suggested, and the learned Vice-Chancellor seems to have given some weight to the suggestion, that the basis on which this principle rests has never been fully understood, and that it would have been better had the Court *ab initio* decided, not that the surety should be absolutely released, but that he should be put to prove his injury, and be allowed damages for any injury he might have sustained, and that, therefore, the authorities which have proceeded upon this principle are in no way to be extended.

I do not feel myself at liberty to comment upon the propriety or impropriety of a principle which, more than half a century ago, was stated by Lord *Eldon* in *Samuell* v. *Howarth* (1) to have been long established, and which has been continually acted upon since that time, and is as well settled and established as any other principle of the Courts of Equity. I think that sometimes the cases are a little open to this observation, that they do not all of them, especially the later cases, clearly and distinctly shew in what way the principle was established and brought to bear. But, undoubtedly, if we look to the earlier cases, amongst which I might cite especially *Oakeley* v. *Pasheller* (2), the principle is laid down very clearly that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period.

To shew that this is the principle, we have only to refer to another class of cases, which, down to one very late case, clearly and distinctly established that it is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged; and for this reason, that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal. I say that this doctrine has been always recognised down to a late period, because Lord *Truro* threw some doubts upon it in the case of *Owen* v. *Homan* (1). But Lord *Cranworth*, in giving judgment in that case on appeal to the House of Lords (2), said there could be no doubt about the case before the House, and that he did not think he should have entered into any discussion of the case had it not been for the doubt thrown by Lord *Truro* upon the principle that you might retain the surety, if that formed part of the original contract as to not suing the principal; and Lord *Cranworth* said that he thought it right to protest against the doubt, because he thought the doctrine was perfectly clear and established.

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(1) 3 Mer. 272.

(2) 10 Bli. 548

Now, that being so, what was the condition of these parties? As I have said, it is plain that, as between *McHenry* and the Plaintiffs themselves, the Plaintiffs were secondarily liable, and *McHenry* was primarily liable; the Plaintiffs were only liable as sureties.

The learned Vice-Chancellor entered at some length into the question whether these were accommodation bills, but really I cannot quite follow the argument on that point, and I do not think it worth while to inquire whether bills are accommodation bills or not, where some commission is paid for the lending of the name. The substance of the case is, whether the relation of principal and surety subsisted, and I think, upon the whole, that it clearly did subsist.

The second point raised by the Defendants was, that in effect this contract, which was entered into with *McHenry* was not a contract to give time to him, but was, in substance, a contract to give time to the surety; and that therefore this case did not come within the rule. But *McHenry* was at that time liable upon the bills; he had given a guarantee to pay them at maturity, and *Overend, Gurney, & Co.* had learned that the Plaintiffs were, as between themselves and *McHenry*, in fact the sureties. By agreeing, therefore, to hold over the bills they must have meant that they would not, during the currency of *Lillo's* bills, place *McHenry*

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(1) 3 Mac. & G. 378; 15 Jur. 339.

(2) 4 H. L. C. 997; 17 Jur. 861.

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in a position in which he could be sued. If they recovered or received the money and handed them the bills, they would obviously break their contract with *McHenry*. If the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves by implication an engagement not to sue the surety. The position of the surety is changed, because it is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt, and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your own hands from doing that which would throw the surety upon the principal. In fact the creditors had bound themselves not to receive payment from the sureties, because if they did receive payment they must give up the bills to the Plaintiffs, who were the sureties, and so allow them to proceed against *McHenry*, which would be contrary to the whole arrangement between them.

There remains one point upon which Mr. *Cole* pressed me very strongly. He argued that *Overend, Gurney, & Co.*, at the time when they took the bills, knew nothing of this, but believed the Plaintiffs to be the principals in every sense of the word as between themselves and *McHenry*, and as between them and *Overend, Gurney, & Co.*; and he argued that their position could not be altered by their being afterwards informed of the existence of a different arrangement, and he cited an authority: *Ex parte Graham* (1). Now in that case the Lords Justices asked if there was any authority to shew that knowledge acquired subsequently to the engagement would fix upon the creditors the obligation of seeing to the interests of the surety; and counsel citing none, it seems to have been held that in that case the discharge did not take place. But *Oakeley* v. *Pasheller* (2) is a precise and direct authority upon the point, and being in the House of Lords is, of course, above that of this Court or that of the Lords Justices. [His Lordship then stated the facts of that case, and that there had been in that case a change of the positions of the principal and the surety, and that Sir *C. Oakeley* was held to have had notice of the change and to have

(1) 5 D. M. & G. 356.

(2) 10 Bli. 548; 4 Cl. & F. 207.

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discharged the executors of the deceased partner, who originally gave this bond to the creditors, and who had originally been the principal debtor, by entering into an engagement by which he gave, on two or three occasions, time to the remaining partners of the bank, who were originally sureties.]

That is a case distinctly and plainly in point; and I apprehend that the hardship involved in the principle is not so great as Mr. *Cole* represents. There is really no hardship in the case, and that is one reason why I proceeded at some little length to shew that the doctrine was not at all infringed upon by the right of the creditor to reserve his remedies against the surety. The Defendants here could have freed themselves from all difficulty whatever by reserving their rights against the Plaintiffs, and if that had been done, the case would have fallen within the principle of *Owen* v. *Homan* (1), and would have been free from all difficulty.

I confess, therefore, that it appears to me that this is a case plainly within the line of authorities, and that I am not advancing a single step beyond the clear principle which those authorities have established. I am obliged to reverse the decision to which the Vice-Chancellor came; and I must make a declaration according to the prayer in the bill, and the Defendants must pay the costs of the suit, except, of course, of the appeal.

Solicitors for the Plaintiffs: Messrs. *Farmer & Robins.*
Solicitors for the Defendants: Messrs. *Markby & Tarry.*

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(1) 4 H. L. C. 997. 17 Jur 861,

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HARDING *v.* METROPOLITAN RAILWAY COMPANY.

[1870 H. 67.]

Railway Company—Compulsory Sale—Agreement—Specific Performance—Assignment of Lease—Covenants.

SCP. 82-6

A railway company, after notice to treat for land has been given to the landowner, and the price of the land has been fixed by arbitrators under the *Lands Clauses Consolidation Act*, is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a Court of Equity to complete the purchase.

A railway company which, after giving notice to treat, has paid the purchase-money for leaseholds, and has, with the consent of the lessee, been admitted into possession, will, at the suit of the lessee within a reasonable time, be compelled to accept an assignment containing the usual covenants.

Decree of the Master of the Rolls reversed.

F. G. *HARDING* and *J. Madden*, the Plaintiffs in this case, were upholsterers carrying on business in certain shops and warehouses in *Fore Street*. In November, 1865, they received from the *Metropolitan Railway Company* notice, under their special Acts and under the *Lands Clauses Consolidation Act*, that the company would require the shops and warehouses occupied by the Plaintiffs. Nothing further was done in the matter until October, 1867, when, after some correspondence as to the amount of compensation, the Plaintiffs served the company with notice to have the amount of compensation settled by arbitration. The shops and warehouses were leaseholds, and one part was held by the Plaintiffs at a rent of £600 under a lease from one *Zuccani* dated the 31st of July, 1867, and made in pursuance of an agreement dated the 1st of September, 1865. The arbitration proceeded, and an umpire was appointed. The arbitrators and umpire fixed at £3644 the compensation to be paid to the Plaintiffs for compulsory sale, goodwill, and loss by exercise of the powers of the company.

The company did not pay this sum, and on the 4th of February, 1869, the Plaintiffs commenced an action to recover it. To this action the company pleaded that the money was to be paid when the Plaintiffs had assigned, but the Plaintiffs had not executed any conveyance or assignment.

Some correspondence took place between the solicitors, and the company agreed to pay. Ultimately the solicitors of the company wrote to the solicitors of the Plaintiffs a letter dated the 29th of September, 1869, as follows:—

"Dear Sirs,—The cheque for the principal, interest, and costs in this matter will be ready on Friday next.

"On consideration, we think the proper course will be for us to meet you on the premises, and receive the deeds and keys in exchange for the cheque, and we will be there at 10.30 on Friday for that purpose."

The solicitors accordingly did attend on the 1st of October, 1869, and paid the Plaintiffs £4328; the keys and leases were at the same time formally delivered up by the Plaintiffs to the company. It appeared, however, that the Plaintiffs were allowed by the company to remain in possession for a short time longer, and one of the Plaintiffs afterwards occupied a part of the property as tenant to the company.

In March, 1870, the Plaintiffs filed their bill in this suit against the company, stating as above stated, and that *Zuccani* had applied for the rent and threatened to sue the Plaintiffs, and praying that the company might be decreed specifically to perform their agreement to purchase and take the premises, and to accept an assignment of the same, and to indemnify the Plaintiffs against the rent and the covenants in the lease.

The company refused to execute any assignment, and averred that the lease was a contrivance between the Plaintiffs and *Zuccani;* that the Plaintiffs had been the owners of the property, and were indebted to *Zuccani,* and had conveyed the property to him knowing that it would be wanted by the company; that the property was not worth more than £400 a year; and that the Plaintiffs wished to have the assignment in order thereby to compel the company to acknowledge the rent of £600, and so to compel them to purchase the interest of *Zuccani* at a valuation founded on rent.

This was entirely denied by the Plaintiffs.

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The Master of the Rolls dismissed the bill without costs (1).

The Plaintiffs appealed.

Sir *R. Baggallay*, Q.C., Mr. *Little*, Q.C., and Mr. *Millar*, for the Appellants:—

The proceedings which have taken place constitute a complete contract between the parties, which contract the Court will enforce. Part of the contract is, that the company, as purchasers, shall take an assignment; and in an assignment of leaseholds the assignee must covenant to indemnify the assignor. Why are we to remain liable to actions for rent or breach of covenant? It may be true that we should have a remedy in equity against the company, but we ought not to be driven to make out our case in equity. Moreover, the company actually pleaded as a defence to our action that we had not conveyed.

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(1) 1871. Mar. 14. Lord Romilly, M.R., after stating the facts down to the delivery of possession to the company, continued :—

There the matter ends. Then, curiously enough, two years afterwards they suddenly came to the Court and asked to have the agreement specifically performed. The Defendants say, and I confess with some reason, "Where is the agreement? We will perform the agreement if you shew us what it is and where it is." But confessedly there is no agreement at all. There is a compulsory taking of the land which is paid for and possession is given, and that is all. But the Plaintiffs say "We are entitled to compel them to take an assignment, because an assignment will contain an indemnity to us against the rent and covenants." But I am disposed to think they are equally indemnified against the rent and covenants without any such assignment. The railway company are liable for all the rent and for the covenants, and any action brought against them might be sustained; and if I read rightly the case of *Close* v. *Wilberforce* (1 Beav. 112) they would be liable to the landlord for all the rents, and for the performance of all the covenants. If that is so, what can I do more than put them in the same situation? If the Plaintiffs were compelled to pay anything, then, no doubt, they might come here for some indemnity. But I cannot make out that they have really ever been called upon, or are ever likely to be called upon, for anything. The case is brought before me in a strange way, and it strikes me that there is something kept back on both sides of which I know nothing. How can I order an agreement to be specifically performed when I know nothing about the agreement but that there was a compulsory taking by the company of the houses which they have taken, and an undertaking to pay the purchase-money which they have paid? How can I inflict upon them some conveyance that they do not want, unless it is necessary for the protection of the Plaintiffs? But the interests of the Plaintiffs do not appear to me to be in peril, and I do not think that there is, in point of fact, any chance that they will ever be so. In that state of the case, and really feeling that there is something which both parties have thought fit not to bring before me, I have determined to dismiss the bill without costs.

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Mr. *Southgate*, Q.C., and Mr. *Bovill*, for the company:—

The whole transaction was at an end when they handed us the keys and the lease; that was the arrangement between us, and there it ought to remain. Those were our terms, on them we paid the money, and nothing more was done for nearly six months, when the vendors seemed to have changed their minds. Our reason for not accepting an assignment is, that we say that the lease is fictitious, and that we shall dispute it against the owner of the reversion; but we shall be estopped if we acknowledge the lease by taking this assignment. We do not want the legal estate; we only want possession, and that we have. There was no contract between us and the landowner making us purchasers in the ordinary sense of the term: *Haynes* v. *Haynes* (1); *Adams* v. *Blackwall Railway Company* (2). Every step was compulsory. Moreover we are now liable in equity, and should be compelled to indemnify them. They cannot want this assignment merely for the purpose of indemnity, and must have some other object: *Close* v. *Wilberforce* (3).

Mr. *Little*, in reply.

Jan. 15. LORD HATHERLEY, L.C., after stating the facts of the case, continued:—

In that state of things, the dry questions of law are, first, whether a person agreeing to take a leasehold interest is or is not bound to accept an assignment of that interest, in which assignment he covenants to indemnify his assignor; and, secondly, if that is so, whether the ordinary relation of vendor and purchaser is or is not constituted by what has taken place between these parties, so that there is an agreement which can be enforced by this Court. I need not go into the authorities which have long established the rule that the purchaser of a leasehold interest is bound to indemnify the vendor against the rent and covenants contained in

(1) 1 Dr. & Sm. 426; 7 Jur. (N.S.) 595.

(2) 2 Mac. & G. 118.

(3) 1 Beav. 112.

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the lease. That was not disputed, but it was contended here, and, as I understand it, before the Master of the Rolls, although he does not seem to have entirely founded his judgment upon it, that this is not the case of a vendor and purchaser where there is an agreement between them of which the Court can decree specific performance. Now that contention was ineffectually raised, and has been distinctly overruled by several authorities, as far as the authorities went, before the decision in *Haynes* v. *Haynes* (1).

There was, indeed, a notion prevalent at one time that a company, by giving notice to treat, committed themselves in such a manner that a Court of Equity would hold that to be an agreement upon their part from which they could not recede, and which could be enforced by the Court before the transaction had gone any further. That notion was, however, found to be erroneous; and it was decided by Lord *Cottenham* in *Adams* v *Blackwall Railway Company* (2) that the giving notice would only authorize the person who received it to insist that the course pointed out by the Act should be taken, and that a mandamus would issue compelling the company to summon a jury or proceed to arbitration for ascertainment of the price. But the case is different when the price is ascertained, for you have then all the elements of a complete agreement, and, in truth, it becomes a bargain made under legislative enactment between the railway company and those over whom they were authorized to exercise their power.

In *Mason* v. *Stokes Bay Company* (3), which I refer to because it was decided on the authority of other cases, I held that when once the price was ascertained, *Adams* v. *Blackwall Railway Company* would not apply; that the parties were then in the same position as if they were under an ordinary agreement; and that a Court of Law could not then, by mandamus or otherwise, enforce performance, inasmuch as it has not the machinery required for the purpose of determining what title has been shewn, or for settling the form of the conveyance.

The same was held by the present Master of the Rolls in *Regent's Canal Company* v. *Ware* (4).

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(1) 1 Dr. & Sm. 426; 7 Jur. (N.S.) 595.

(2) 2 Mac. & G. 118.

(3) 32 L. J. (Ch.) 110; 11 W. R. 80.

(4) 23 Beav. 575. 3 Jur NS. 924

As to the abstract principle, I have no doubt that a company purchasing a leasehold interest as this company has done, is bound to take an assignment and bound to enter into an engagement to indemnify the vendor against the covenants of his lease. It would be a grievous injustice to take property by force from a man who was unwilling to dispose of it, and to leave him subject to a substantial rent of £600 a year, and to the other covenants and conditions of his lease.

The only argument against applying this doctrine here is, that the lease may have been fictitiously made in order to enhance the value of the reversion. In fact, the company did contend that the property was worth only £400 a year, and that if the company took an assignment they would afterwards be estopped from disputing the validity of the lease. If such fraud was proved, no doubt this Court would give ample assistance; but a complete answer to that argument is, that all these things were, no doubt, brought before the arbitrators; and if it is true that the rent was too heavy, that must have been taken into account in assessing the compensation to be paid to the lessee; and the company may, at the present moment, have in their pockets the difference in the compensation which may have been deducted because of the heavy rent.

But, in fact, there is no evidence of this before me. [His Lordship then commented on the evidence as shewing that the rent was not excessive, and that there was no secret motive.] I should feel more reluctant to differ from so experienced a Judge as the Master of the Rolls if he had not apparently been induced to decide as he did by an error which ought to have been corrected at the time. His Lordship thought that the bill had not been filed until two years had elapsed, which, in his opinion, shewed that the lessees had no *bonâ fide* wish to obtain an indemnity. If the lessees had allowed so much delay, I should say that this Court would not be disposed to afford them any assistance; but, in fact, they applied within a few months after the arrangement as to giving up possession had been made.

I do not think that their giving up the keys and handing over the deeds prevented them from filing their bill within a reasonable time afterwards, and they seem to me not to have done anything which would preclude them from claiming their rights.

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RAILWAY CO.

The decree of the Master of the Rolls must be reversed, and a declaration made that the company are bound to accept an assignment of the lease, with a reference to Chambers to settle the assignment with all proper covenants on each side in case the parties differ. The Plaintiffs to have all the costs of the suit except those of the appeal.

Solicitors for the Plaintiffs: Messrs. *Taylor & Jaquet.*
Solicitors for the Defendants: Messrs. *Burchell.*

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Dec. 15.

Post 436
10 Ch 523

Company—Misapplication of Funds by Directors—Borrowing Powers—Rigging the Market—Notice—Common Directors and Solicitor.

Two directors of *Company A.* were also directors of *Company B.*, and both companies employed the same solicitor. *Company A.* owed money to their contractor, which, however, was not payable immediately. The contractor had bought shares in the company and was pressed by the stockbrokers for the money. *Company A.* agreed to advance him £7000, and borrowed the money from *Company B.* on the security of a mortgage. The loan was negotiated by one of the persons who was a director of both companies, and the solicitor who acted for both companies prepared the mortgage. *Company A.* had power under the articles to borrow money, but were not authorized to buy up their own shares. Both companies afterwards were wound up:—

Held (reversing the decision of *Malins*, V.C.), that *Company B.* were not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, and that they were consequently entitled to prove against the estate of *Company A.* under the winding-up.

THIS was an appeal from a decision of Vice-Chancellor *Malins* made in the winding-up of the *Marseilles Extension Railway and Land Company, Limited*.

The company was instituted for the purpose of obtaining a concession of land for the construction of a railway to *Marseilles,* and for acquiring land in connection with that object. The memorandum of association was dated the 29th of December, 1864.

One of the principal promoters of the company was Mr. *W. Bowles,* who entered into a contract to sell the company certain lands which he had purchased in *France,* and a concession from the French Government, and to construct their railway. By a subsequent agreement made on the 21st of November, 1865, the money payable by the company was fixed at £208,000, of which £120,000 were to be paid to *M. Talibot,* the owner of the lands, and £88,000 to *Bowles,* on the completion of the purchase, and he gave up all right to the contract for the railway. *Bowles* was accordingly credited with £88,000 in the books of the company.

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Previously to this date *Bowles* purchased shares of the company to a large extent on the *Stock Exchange,* for which he was unable to pay on the day of settlement. Under these circumstances, he applied to the company for an advance on account of the money due to him. The directors, not being able to pay the money, and fearing that any failure on the part of *Bowles* would injure the company, applied to the *Crédit Foncier and Mobilier of England* to advance them £10,000.

Two of the directors of the *Marseilles Railway Company,* one of whom was Mr. *Newbon,* were at that time also directors of the *Crédit Foncier,* and Mr. *Heritage,* the solicitor of the *Marseilles Railway Company,* also acted as solicitor for the *Crédit Foncier.* Mr. *Newbon* and Mr. *Heritage* were deputed to negotiate the loan, and they accordingly attended at the board meeting of the *Crédit Foncier* on the 14th of November, 1865, for that purpose.

Mr. *Newbon* stated in his examination as follows: "The £7000 mentioned in the minutes of the 15th of November, 1865, as having been lent by the *Crédit Foncier,* was wanted to pay *Bowles* under his contract. We were advised that he was entitled to receive it. I made the proposal to the *Crédit Foncier* for the £7000. I made it to Mr. *Grant,* who was the managing director at that time. It was brought before the *Crédit Foncier* board. I was, no doubt, present. I do not remember who was present except Mr. *Grant* and myself. I told Mr. *Grant,* in his private room, what the money was wanted for. I have no doubt that Mr. *Grant* stated to the board what the money was wanted for, but I have no recollection of hearing him do so. I told Mr. *Grant* that *Bowles* had entered into engagements to pay money, which I believed he had no means of paying unless he received some payments from the directors of the company under his contract. I told Mr. *Grant* that these engagements were to pay stock-brokers for shares in the company in question, which he (*Bowles*) had bought. The company was anxious to preserve its reputation on the *Stock Exchange,* and therefore we were desirous of assisting *Bowles* to meet his engagements."

The directors of the *Crédit Foncier* consented to advance the money, and promissory notes were thereupon given by the *Marseilles Railway Company* for £10,000, and the repayment of the

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loan was secured by a mortgage of certain lands which the company had contracted to purchase at *Marseilles*. The mortgage was prepared by Mr. *Heritage*. Of the money so advanced £7000 was paid to *Bowles*, or to the brokers to whom he was liable, and £3000 was applied in meeting some bills on which the company were liable.

In August, 1866, the *Marseilles Extension Railway Company* was wound up voluntarily, and subsequently the *Crédit Foncier* was also wound up voluntarily.

The liquidators of the *Crédit Foncier* claimed to prove against the estate of the *Marseilles Railway Company* for the amount advanced by them, the mortgage having turned out to be valueless. The claim was resisted by the liquidators of the *Marseilles Railway Company*, so far as related to the £7000 advanced to *Bowles* on the ground that the money was borrowed by the directors for a purpose which was not warranted by the articles of association, namely, the purchase of shares in their own company, and that the directors of the *Crédit Foncier* had notice of the purpose for which the money was to be applied. The principal clauses of the articles of association bearing on the question were the following:—

Art. 23. "The directors may issue debentures, bonds, or obligations of the company, at any time, and in any form or manner, and for any amount which the directors may from time to time determine."

Art. 57. "The directors shall, subject to the powers of the general meetings, have the entire management of the company, and they shall have power to appoint and fix the duties and salaries of, and to remove, the manager, secretary, and all clerks, officers, and servants, and generally to do all acts, matters, and things which are necessary or proper for carrying on the business of the company."

"(*a*) Without limiting the general authority hereby given to the directors, they shall have the following specific powers: viz., they may, for the purposes of the company, make, draw, accept, or indorse any promissory note, bill of exchange, or other negotiable instrument, and may borrow on behalf of the company from any person or persons any sum or sums of money, either by way of mortgage of any of the property of the company, or on bonds,

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debentures, or by receiving moneys on deposit, or otherwise, as they may see fit."

The claim was brought before the Vice-Chancellor *Malins*, on an adjourned summons, when His Honour refused the claim, and the liquidator of the *Crédit Foncier* appealed from his decision (1).

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(1) 1871. Nov. 6. WN(1871) 194

SIR R. MALINS, V.C., said that the question to be settled was, whether the money, which was advanced by the *Crédit Foncier*, was parted with under such circumstances as to constitute a debt against the *Marseilles Railway Company*.

With respect to borrowing money, different principles were applicable to public companies from those which applied to individuals. Shareholders in a company had certain protections thrown over them, and it did not follow that any sum borrowed by the directors constituted a debt against the shareholders. It must be borrowed for a purpose within the powers conferred upon the directors by their deed of settlement. There could be no doubt that these two companies were intimately connected with each other, and that the *Marseilles Railway Company* was an emanation from the *Crédit Foncier*. Although he could not, of course, import the evidence of one case into another, yet the transactions of these companies had been so often before him that it was well known that the object of the *Crédit Foncier and Mobilier*, presided over by *Albert Grant*, the great speculator of the age, was to bring out and foster other companies, and that they were not very scrupulous as to the means to which they resorted. The evidence in this case appeared to him conclusive that this company had fostered and encouraged the formation of the *Marseilles Railway Company*. Of the eight persons who signed the memorandum of association, four were directors of the *Crédit Foncier*. Mr. *Heritage* was the solicitor of both companies, and he could not hesitate in coming to the conclusion that every part of the transactions of the *Marseilles Railway Company* was known to, participated in, and promoted by the *Crédit Foncier*.

Then what was the course of proceeding? The company made a contract with Mr. *Talibot* for land in *France* for £120,000, which, however, they never obtained, as the land was taken by an incumbrancer, and then afterwards they professed to purchase the same land of *Bowles* for £208,000, crediting him with an advanced price of £88,000. He could only come to the conclusion that this was a simply colourable transaction, and that they credited him with this sum merely for the purpose of enabling the directors to carry out their schemes for misleading the public. The *Crédit Foncier* were also at that time engaged in promoting the *Imperial Land Company of Marseilles*, and it was clear from the evidence of the secretary that it would not have done for the *Crédit Foncier* to let the *Marseilles Railway Company* go down, because in that case they could not have floated the *Imperial Land Company*. Therefore, *Bowles* was sent into the market to buy shares in the *Marseilles Railway Company*, through, not one, but several brokers, and in so doing lost a large sum of money. How was this money to be provided? The *Marseilles Railway Company* had none, so they sent Mr. *Newbon*, who was a director of both companies, and Mr.

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Mr. *Glasse*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Jackson*, for the Appellants:—

There is no evidence that the *Marseilles Company* had any illegal intention in borrowing the money. On the contrary, it is clear that the directors conceived that a large sum of money was really due to *Bowles*, although it might not have been payable immediately. But whatever their object may have been, there is nothing to fix the *Crédit Foncier* with any notice of it. The *Marseilles Company* had clear powers to borrow money, and that was sufficient for the security of the lenders. The mere fact of the two companies having the same solicitor, or some common directors, does

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Heritage, who was the solicitor for both companies, to the *Crédit Foncier*, and they told *Grant* the purpose for which the money was wanted, and obtained the loan from the board. Under these circumstances, he was asked, sitting as a jury, to come to the conclusion that *Albert Grant*, as representing the *Crédit Foncier*, believed that money was really due to *Bowles*, and that he did not know the purpose for which the money was wanted. He was perfectly satisfied, on the whole evidence, that *Albert Grant*, and *Newbon*, and all others associated with them, well knew that there was no debt due to *Bowles*, and that they knew that the money was wanted for "rigging the market," and that all had been done with their full consent and approbation for the purpose of carrying into effect their general purpose of fraud upon the public.

It had been urged upon him that the *Crédit Foncier* had no notice, because the knowledge possessed by *Newton* and *Heritage* was not in the same transaction. But that was simply a dealing between borrower and lender; the same solicitor acted both for borrower and lender; and nothing could be clearer law in that Court than that where the same solicitor is employed by both borrower and lender, whatever knowledge he had of the circumstances of the borrower the lender was affected by that knowledge. Mr. *Heritage*, as the agent of both parties, had notice of these transactions, and Mr. *Newbon*, as a director of both companies, was party to them; his conduct as director of one company could not be separated from his conduct as director of the other. He considered that *Zulueta's Claim* (Law Rep. 5 Ch. 444) went the whole length of the present case. In that case Mr. *Henry* was affected with notice of the constitution of the company, and in the present case *Grant*, the chairman of the *Crédit Foncier*, knew as well as *Newbon* and *Heritage* that, although the directors of the *Marseilles Railway Company* were empowered to borrow money, they could not do so for the purpose of "rigging the market," or paying losses incurred in the process. On the whole, his Honour was of opinion that the whole transaction was colourable, was fraudulent—a transaction out of which no rights could arise, in which all the Court could do was to leave the parties where they were, and to refuse to interfere on one side or the other. He therefore, refused the claim, but without costs.

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not affect each company with notice of everything that is done in the other: *In re European Bank* (1).

The Vice-Chancellor assumed that one company was an emanation from the other, and that they were conspiring together to delude the public, of which there is no evidence whatever.

Mr. *Higgins* and Mr. *Gill*, for the liquidators of the *Marseilles Extension Railway Company*:—

The transaction was a fraud upon the articles of the *Marseilles Company*, and was not binding upon the shareholders. No money was really due at that time to *Bowles*, and the evidence is conclusive that the directors advanced the money for the purpose of "rigging the market." It was a breach of trust on the part of the directors, of which the *Crédit Foncier* had notice when they lent the money. This is not an ordinary case of constructive notice, for Mr. *Newbon* actually informed *Grant* that the money was to be spent in paying for shares in the company, and the same solicitor was employed for both parties in the transaction. Whether one company was an emanation from the other or not, it is clear that they had common interests; and the directors of the *Crédit Foncier* believed that the ruin of the *Marseilles Company* would materially injure their company: *Balfour* v. *Ernest* (2); *Rolland* v. *Hart* (3); *Zulueta's Claim* (4).

SIR G. MELLISH, L.J.:—

This is a claim on behalf of the *Crédit Foncier Company* to prove against the *Marseilles Extension Railway and Land Company* for £10,000, which was money lent, in the year 1865, on the security of promissory notes given by the *Marseilles Company* to the *Crédit Foncier*.

By the 57th clause of the articles of association of the *Marseilles Company* they had the most unlimited authority—of course for the purposes of the company—to borrow money upon the security of bills of exchange and promissory notes. Then it is not denied that they did borrow money from the *Crédit Foncier Company* upon promissory notes, and therefore there is a perfectly plain

(1) Law Rep. 5 Ch. 358.
(2) 28 L. J. (C.P.) 170. 5 Jur NS 439
(3) Law Rep. 6 Ch. 678.
(4) Law Rep. 5 Ch. 444.

primâ facie case. The defence is in substance that this money was really borrowed for a purpose that was *ultrà vires*—that either it was borrowed to "rig the market," or was borrowed for the purpose of buying up the shares of the company itself, there being no clause in the articles of association by which the *Marseilles Company* were allowed to buy up their own shares; and it is alleged that the *Crédit Foncier* had notice of it at the time the money was lent and the notes given. The witnesses called for the purpose of proving this defence were, Mr. *Newbon*, a director of both companies, and also the secretary. But Mr. *Newbon* does not really prove the case; for the result of his evidence is, that Mr. *Bowles*, the contractor, had a claim for a large sum of money against the company, and that it was extremely desirable that some of it should be advanced to him, because he had been speculating very largely in purchasing shares, and because if the money was not paid to enable those shares to be taken up, they would not get a settling day on the *Stock Exchange*, and the company would not be enabled to start. Although that was the way in which the money was to be expended, according to Mr. *Newbon's* statement, it was money which was due to *Bowles* on the existing contracts with the company. Then it is proved by Mr. *Newbon* that he and Mr. *Heritage*, the solicitor of both companies, went to the *Crédit Foncier* for the purpose of negotiating the loan; and he says that he told Mr. *Grant*, the managing director of the *Crédit Foncier*, those facts; that he told him they wanted to borrow the money for the purpose of making a payment to their contractor; that the money, he believed, was due from them, but the real object why they wanted to pay him the money was, that it would be prejudicial to the company (and he probably said also, to the *Crédit Foncier*, who were about to start another land company at *Marseilles*) if those shares were not taken up and the company was not started. This evidence certainly does not by itself establish the defence. The Vice-Chancellor appears to have come to the conclusion that all this was a sham, and that there was nothing due to *Bowles*; but there is no proof of that in the evidence now before us, and the Vice-Chancellor appears to have drawn some inference in this case from the knowledge of the affairs of the *Crédit Foncier* which he had gained in previous cases. But we must decide this case on the evidence that is before us. I do not think that it is necessary to go into a minute examination of the deeds to see whether any money really was due to *Bowles*. It would rather appear that none was actually due to him at that time, although there were contracts on which money might afterwards become due, and this would rather appear to have been an advance to him in anticipation of such money. But in my opinion there is no evidence at all which could properly be left to a jury, if this were being tried at Common Law, that the *Crédit Foncier* had notice of any of these transactions, so as to make this loan on the security of these negotiable instruments in itself an invalid loan.

In the first place, it is said that the one company was an emanation from the other, and whatever was known to the one was known to the other. That is a general statement which it is difficult for me to follow; and it is, in point of fact, denied by the Appellants. The evidence, as far as there is any on the subject, is that the *Marseilles Company* was not a company started by the *Crédit Foncier*. It appears no doubt that many of the original promoters of the *Marseilles Company* had been directors in the *Crédit Foncier*, and that at the time when this transaction was going on there were two common directors, one of whom was Mr. *Newbon*. What does the circumstance of there being two common directors prove? I need hardly go into that, for Mr. *Newbon* distinctly denies that he had himself notice that the money was not due to *Bowles*, or that there was any impropriety in the transaction; and this is not contradicted. But even if that were not so, I cannot think that, because he was a common director to the two companies, we are on that account to say that the one company has necessarily notice of everything that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company. It appears to me, that a director is simply a person appointed to act as one of a board, with power to bind the company when acting as a board, but having otherwise no power to bind them. And when he goes on behalf of the *Marseilles Company* to deal with the *Crédit Foncier*, and the *Crédit Foncier* company negotiate with him and come to a certain resolution, it would be, as it appears to me, contrary to sound principle to hold that the *Crédit Foncier* had necessarily notice, or that their board had notice, of every fact that happened to be known to Mr. *Newbon*. That appears to me quite consistent with what was laid down by Lord Justice *Giffard* in *Zulueta's Claim* (1), which has been referred to.

Then it is said that there was a common solicitor, and therefore everything known to one company must have been known to the other. Mr. *Heritage* is not called, and all that is said is, that he was the solicitor of both companies and used to attend their boards; but what as matter of fact he actually knew, or what conclusion he drew from what he knew, we have no evidence. It appears to me it would be going very far indeed to say, not that the *Crédit Foncier* had notice of any facts which had happened, but that they were bound by any knowledge that Mr. *Heritage* might have of an intention on the part of the *Marseilles Company* to expend the money which they were professedly borrowing for a purpose quite legitimate for some other purpose. I cannot see that there is any evidence at all when the loan was agreed upon that Mr. *Heritage* had begun to act or was acting as solicitor for the *Crédit Foncier*. He went with Mr. *Newbon* to negotiate the loan. That loan was only negotiated with Mr. *Grant*, the managing director of the *Crédit Foncier*, and it was brought before the board of the *Crédit Foncier*, and the board as a board came to the resolution to make the loan, not, as far as appears, consulting Mr. *Heritage*, or employing him at all as their solicitor in the matter, but acting as commercial men upon their own discretion. No doubt it may have been part of the terms that there should be a mortgage, and Mr. *Heritage* may have been employed as their solicitor to draw up the mortgage deed. But I cannot think that is sufficient to affect the *Crédit Foncier* with notice of any improper mode in which this money was to be expended, even if Mr. *Heritage* had, which I cannot see that there is any evidence that he had, notice that it was to be expended for an improper purpose.

After all, the real question is, which of two innocent sets of shareholders is to bear this loss? It appears to me that if the directors of the *Marseilles Company* have been guilty of an improper application of the funds of the *Marseilles Company* it would be more just that the shareholders of the *Marseilles Company*, whose directors improperly applied this money, should bear the loss, than the inno-

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(1) Law Rep. 5 Ch. 444.

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cent shareholders of the *Crédit Foncier*, whose directors appear to have done what it was a perfectly legitimate thing for them to do; it being a part of their business to lend money, and the other company having power to borrow it.

It appears to me that this claim is made out, and that the order of the Vice-Chancellor should be reversed, and an order made allowing the claim, with costs, in the Court below.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. I desire only to add this: I cannot understand how a director of a company going to borrow money from another company can put the company from whom he borrows it in any different position from that in which a joint stock bank would be placed by a director of it asking a loan for himself. Is it to be imputed to the banking company that they have knowledge of everything the director knows about his own private affairs? Such a proposition seems to be most unreasonable.

Solicitor for the Appellants: Mr. *Heritage*.
Solicitors for the Respondents: Messrs. *Hathaway & Andrews*.

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In re KILVERT'S TRUSTS.

Will—Latent Ambiguity—Parol Evidence—Imperfect Description—Legacy to Charitable Society, or for Charitable Object.

14 Eq. 232-3
16 Eq. 517
1918 2 Ch. 342.

A testatrix, by will made in 1868, gave a legacy to "the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of *Worcester*, to be applied by him for the benefit of that charity." Two societies made a claim. One had been founded in 1777 for the relief of the widows and orphans of the clergy of the diocese, at which time the diocese comprised only the Archdeaconry of *Worcester*. In 1837 the Archdeaconry of *Coventry* was added to the diocese, and in 1848 the *Worcester* society altered its title, so as to shew that its operations were restricted to the Archdeaconry of *Worcester*. The other society had been founded in 1777 for the relief of widows and orphans of clergy in the Archdeaconry of *Coventry*. The father of the testatrix had been a subscriber to the *Worcester* society till his death in 1817. His widow had continued the subscription till her death in 1860. And the testatrix had continued it from

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that time at an increased rate; but it did not appear that the testatrix, or any of her family, had subscribed to the *Coventry* society:—

Held, by *Malins*, V.C., that the gift was to be treated as a gift to an object, not to a particular society, and must be apportioned between the two societies:

Held, on appeal, that the gift was a gift to a particular society, with a slight inaccuracy of description, and that the *Worcester* society was solely entitled.

THIS was an appeal from a decision of Vice-Chancellor *Malins.*

The testatrix, Miss *Kilvert*, died on the 26th of November, 1870, having, by will made in July, 1868, given a legacy of £10,000 "to the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of *Worcester*, to be applied by him for the benefit of that charity."

About 1777 a society had been founded at *Worcester* called *The Society for the Relief of the Widows and Orphans of Poor Clergymen, &c., &c., within the Diocese of Worcester.*

At that time the diocese of *Worcester* was co-extensive with the Archdeaconry of *Worcester*, and remained so till 1837, in which year the Archdeaconry of *Coventry* was added to the diocese. After this, in 1848, the rules of the society were altered, so as to keep its operations confined to the old diocese, and its title was altered to *The Society for the Relief of Clergymen's Widows and Orphans, and Necessitous Clergymen, in the Archdeaconry of Worcester.*

About 1777 a society had been founded called *The Charity for the Relief of Necessitous Clergymen, their Widows and Children, within the Archdeaconry of Coventry.* This society had remained unaltered up to the present time.

The testatrix was the daughter of a clergyman who was a yearly subscriber of £1 1s. to the *Worcester* society, and died in 1817. After his death his widow continued this subscription till her own death in 1860, and the testatrix, on her mother's death, increased this subscription to £5, which she continued during the remainder of her life. Neither the testatrix nor any of her family had subscribed to the *Coventry* society. There was no other society besides these two which could claim to be the object of the gift.

The legacy having been paid into Court under the *Trustee Relief Act*, the *Worcester* society petitioned for payment of it to

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them. The Vice-Chancellor *Malins* held that it must be apportioned between the two societies (1). The *Worcester* society appealed.

Mr. *Cotton*, Q,C., and Mr. *C. Walker*, for the Appellants:—

There is no society to which the words of the gift accurately apply, but it is plain that the testatrix intended a gift only to one society. The words are *primâ facie* applicable to the *Worcester* society; and when we look at the fact of the testatrix having been a subscriber to this society, and not to the other, evidence of which is admissible as part of the surrounding circumstances (*Wigram's* Extrinsic Evidence (2)), there can be no doubt which society was intended. In *Bernasconi* v. *Atkinson* (3) part of the description applied to one person and part to another, and parol evidence was admitted according to the principle of *Doe* v. *Hiscocks* (4). The cases as to apportioning, *Simon* v. *Barber* (5), *Bennett* v. *Hayter* (6), do not apply; the gift is not a gift "for the relief of the widows and orphans of the clergy of the diocese of *Worcester*," but a gift to a particular society called *The Society for the Relief, &c.* It is a mere case of inaccurate description.

Mr. *Glasse*, Q.C., and Mr. *Vaughan Hawkins*, for the *Coventry* society:—

The Court will look to the object of the gift, which is plainly indicated to be the relief of the widows and orphans of clergy in the diocese: *In re Maguire* (7); *In re Clergy Society* (8). Parol evidence as to subscriptions is not admissible to shew the intention: *Drake* v. *Drake* (9).

[The Lord Justice Mellish referred to *Grant* v. *Grant* (10).]

There is no case in which a charitable society has obtained a bequest unless the description of the object has been correct. A purpose is pointed out which the Court can carry into effect by a scheme, as is indicated in *Mills* v. *Farmer* (11), and was done in

(1) Law Rep. 12 Eq. 183.
(2) Page 160.
(3) 10 Hare, 345, 348.
(4) 5 M. & W. 363.
(5) 5 Russ. 112.
(6) 2 Beav. 81.
(7) Law Rep. 9 Eq. 632.
(8) 2 K. & J. 615.
(9) 8 H. L. C. 172.
(10) Law Rep. 5 C. P. 727
(11) 1 Mer. 55, 96.

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Loscombe v. *Wintringham* (1) and *Reeve* v. *Attorney-General* (2). In the case of *Clark* v. *Taylor* (3) the description of the objects was too vague to have effect given to it.

SIR W. M. JAMES, L.J. :—

I cannot bring my mind to entertain any doubt as to what the meaning of the testatrix was. The sole question is, do her words amount to a gift for the relief of the widows and orphans of clergy throughout the whole diocese of *Worcester?* Now, first, are the words "for the relief of the widows and orphans, &c.," used to indicate the objects of the bounty of the testatrix, or are they only used as part of the description of a society to which the testatrix intends to give a legacy? I am clearly of opinion that they are only part of the description, and that what we have to find out is—who answers the description of the treasurer to whom the legacy is given? The treasurer of the *Worcester* society gives parol evidence to shew that he answers the description, just as if a legacy was given "to the son of *A. B.*," a claimant would give parol evidence to shew that he was the son of *A. B.* Had there been no other society with any such object, it would have been idle to suggest any doubt as to the treasurer of the *Worcester* society being the person intended; as idle as to say that a bequest to "the Dean of *Westminster*" was not good, because he ought to have been described as the Dean of the Collegiate Church of St. *Peter*, at *Westminster*. Such a slight inaccuracy of description would have no effect. Here, however, we have a second society, which, if it had existed alone, might, I will assume, have answered the description with sufficient certainty. Parol evidence, then, is admissible to shew which of the two was meant. Evidence has always been admitted to shew which of two societies the testator knew, and to which of them he subscribed. Such evidence is admissible to remove an ambiguity, if there has been sufficient ground laid to raise an ambiguity, and I am assuming against the Appellants that the *Coventry* society has raised an ambiguity. The fund must, in my opinion, be paid to the treasurer of the *Worcester* society.

(1) 13 Beav. 87.

(2) 3 Hare, 191.

(3) 1 Drew. 642.

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In re KILVERT'S TRUSTS.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The language of the bequest shews that the testatrix had some particular society in her mind, and the question is what society? There is no difference between the course to be adopted here and in any other case of finding who answers the description given in a will of a legatee. If there were no society answering the description sufficiently to enable it to claim the legacy, it may be that the Court would carry the gift into effect as a gift for the relief of the widows and orphans of the clergy of the diocese. Here, however, I think it clear that the Appellants come near enough to the description to be entitled to the legacy if there were no other society to compete with them. There is a description of the society by its old name; its name has been changed, but its object is precisely the same as at first, and the old name is not wholly inapplicable to it. Then, assuming another society to come near enough to the description to have ground for claim, parol evidence is admissible to remove the ambiguity, and the evidence adduced is decisive.

Solicitors: Messrs. *Merediths, Roberts, & Mills*; Messrs. *Duncan & Murton.*

L. J. J.
1871
Dec. 16, 18.

In re OGILVIE.

Judgment Creditor—27 & 28 *Vict.* c. 112, s. 4—*Railway Company—Separate Undertakings—Superfluous Lands.*

An existing railway company was authorized to make an extension line, by an Act which enacted that the capital might be raised by an issue of new shares, to be called extension shares, and that the works authorized by it should, "for financial purposes, form a separate undertaking," and that the capital and new shares created under its powers should constitute a separate capital; and that the profits of the extension line applicable to dividend should be wholly applied in payment of dividend on the extension shares; and that the extension shareholders should not be entitled to dividends out of any other profits of the company, and that the company might raise by mortgage, any additional sums not exceeding £28,000; but not till all the extension capital had been subscribed for and half of it paid up; and that the money raised by new shares or mortgage, should be applied only for the purposes of the extension Act. A contractor, to whom the company was indebted in respect of the construction of the original line, obtained judgment against the company, extended certain surplus lands acquired under the powers of the extension Act, and then applied to the Court for a sale:—

Held (affirming the decision of *Wickens*, V.C.), that the creditor was entitled to an order for sale; for that, whatever might be the rights of the different classes of shareholders *inter se*, the lands were lands of the company, liable to be sold for payment of any judgment debts of the company.

THIS was an appeal by the *Tendring Hundred Railway Company* from an order of Vice-Chancellor *Wickens* made on the application of a judgment creditor.

The company were incorporated by the *Tendring Hundred Railway Act*, 1859 (22 & 23 Vict. c. cxix.), for making a railway from *Hythe*, near *Colchester*, to *Wivenhoe*, in *Essex;* and by the *Tendring Hundred Railway Act*, 1862, 25 & 26 Vict. c. xxxiv., they were authorized to extend the railway to *Colchester*. *Ogilvie* was employed by the company to construct the lines authorized by these Acts, and on the 1st of April, 1863, the company gave him an acknowledgment under their corporate seal that they were indebted to him in the sum of £2000, which was to bear interest at £5 per cent. per annum, payable as therein mentioned. On the 7th of February, 1868, they gave him an acknowledgment under their corporate seal that they were indebted to him in the sum of £2820 for work done and materials supplied by him for the purposes of the undertaking authorized by the two above-mentioned Acts, or one of them, which sum was to bear interest at £5 per cent. payable as therein mentioned.

In 1869 *Ogilvie* commenced an action against the company, in which he recovered judgment against them for £5734 0*s.* 8*d.*, the amount due to him for work and materials, and on the 12th of July, 1870, lodged a writ of *elegit* with the Sheriff of *Essex*. On the 13th of August an inquisition was held before the sheriff, and it was found that the company had no goods or chattels in the company, but were seised in fee of certain specified lands, being surplus lands. These lands were delivered by the sheriff to the judgment creditor, who presented his Petition under 27 & 28 Vict. c. 112, s. 4, for a sale of the lands.

The company resisted the application, and set up the defence that the lands were surplus lands taken under an extension authorized by the *Tendring Hundred Railway Extension Act*, 1863,

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26 & 27 Vict. c. cxliii.; which extension, they contended, formed a separate undertaking not subject to the liabilities of the company in respect of the undertaking authorized by the two earlier Acts. By this later Act the company was empowered to make two railways from points in their existing line to *Weeley* and *Walton,* in *Essex,* and to raise, for the purposes of the Act, any sum not exceeding in the whole £85,000, by the creation and issue of 8500 £10 shares, to be called extension shares. The shares were to confer the like qualifications and rights of voting as original shares, and the holders were to be distinguished as extension shareholders.

Sect. 40: "The railways and works by this Act authorized to be constructed shall, for financial purposes, form a separate undertaking, and the capital and new shares created under the powers of this Act shall constitute a separate capital." Sect. 41: "The profits from time to time applicable to dividend of the railways by this Act authorized shall be wholly applied in payment of interest or dividend on the extension shares; and the holders of those shares shall not, in respect thereof, be entitled to interest or dividend out of any other profits of the company." Sect. 42: "All new shares created under the powers of this Act shall be designated by a distinctive title in the books of the company, and on the certificates issued for the same; and the company shall keep separate accounts of all receipts and payments from, for, or on account of the railways by this Act authorized." Three directors were to be elected by the original shareholders, two by the extension shareholders, and two by the *Great Eastern Railway Company* when they had subscribed to a given amount. Sect. 49 gave the company a power to raise on mortgage any additional sums not exceeding £28,000; but no such sum was to be borrowed till all the extension capital had been subscribed for, and one half of it paid up. And sect. 50 enacted, that all and every part of the money which the company were by that Act authorized to raise by new shares or by mortgage should be applied only to the purposes authorized by the Act.

The solicitor for the company deposed that he accidentally found out that the inquisition was being held, and appeared at it; but that the under-sheriff held that he was not entitled to attend or be heard.

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On the 10th of November, 1871, Vice-Chancellor *Wickens* made an order directing inquiries—first, what was due to *Ogilvie* on his judgment; secondly, what lands and property had been extended under the *elegit*, and what were the nature and particulars of the interest of the company in them, and of their title thereto, and whether any and which of such lands were superfluous lands within the meaning of the *Lands Clauses Consolidation Act;* fourthly, an inquiry as to incumbrances on the lands. (a)

From this order the company appealed.

Mr. *Greene*, Q.C., and Mr. *Millar*, for the company, referred to the provisions of the last-mentioned Act, and contended that the undertakings were distinct, and that the company were in the position of trustees of their surplus lands for the extension shareholders, and that such lands could not be taken for the purpose of paying debts contracted exclusively for the purposes of the original undertaking.

[They referred to *Great Northern Railway Company* v. *South Yorkshire Railway Company* (1); *Ames* v. *Trustees of the Birkenhead Docks* (2); *Gardner* v. *London, Chatham, and Dover Railway Company* (3); *Bowen* v. *Brecon Railway Company* (4); *In re Potteries, Shrewsbury, and North Wales Railway Company* (5).]

Mr. *Dickinson*, Q.C., and Mr. *W. P. Beale*, for *Ogilvie*, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Vice-Chancellor could not have done otherwise than make this order. It appears to me that, under 27 & 28 Vict. c. 112, s. 4, a judgment creditor is entitled to ask, *ex debito justitiæ*, for a sale of the debtor's land. Of course only the debtor's interest in the land can be sold; and if any third party has an equitable claim upon the land he is not bound by the order, but can take steps to enforce his right in the regular way. If there were any collusion between a railway company and a judg-

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(1) 9 Ex. 642.
(2) 20 Beav. 332. / Jur NS 529.
(3) Law Rep. 2 Ch. 385.
(4) Ibid. 3 Eq. 541.
(5) Law Rep. 5 Ch. 67.

(a) See 2 Seton 1140 No 6 Reg Lib. 1871 B 2569

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ment creditor to give the creditor a remedy affecting the interests of parties whom the company had no right to affect, the Court would interfere to prevent effect being given to such a scheme. But a company, like any other debtor, is bound to pay its debts, and cannot escape from this obligation by saying that its property, which the creditor seeks to attach, ought, as between different classes of shareholders, to be applied in a particular way. It may be that, as between the extension shareholders and the original shareholders, the lands now in question are the property of the former, and that they have rights against the latter, if such property is applied in payment of this debt; but the fact that, for the financial purposes of the company, the extension line is treated as a separate undertaking, does not make these lands cease to be property of the company, liable to be taken by any *bonâ fide* judgment creditor of theirs. The appeal must be dismissed with costs.

Solicitors: Messrs. *J. B. Batten*; Messrs. *F. & T. Smith & Sons.*

L. JJ.
1871
Dec. 7.

Ex parte HONEY. *In re* JEFFERY.

Bankruptcy—Double Proof—Several Contracts—Bankruptcy Act, 1869, s. 37.

A joint and several promissory note was signed by two members of a firm, by the firm, and by several other persons. The firm having become bankrupt, the holder of the note carried in proofs against the joint estate of the firm, and against the separate estates of the two partners who had signed the note:—

Held (affirming the decision of the Registrar), that the holder was entitled to prove against, and receive dividends from, both the joint estate of the firm and the separate estates of the two partners who had signed the note.

8 Ch 917-6
10 Q.B. 412, 420
2 App Cas 592
594-6,
1 Ch. D. 349.
5 App Cas 164
4 Ch. D. 123.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting for the Chief Judge, admitting a proof.

James Reddecliffe Jeffery, *F. J. Jeffery*, *J. Barnard*, *W. H. Watts*, and *W. Heard*, were carrying on business in co-partnership, under the firm of "*J. & W. Jeffery & Co.*" In 1869 it was arranged that *William Samuel Jeffery* should join the firm, and borrow £10,000, which he was to bring in as his share of the capital. Accordingly

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W. S. Jeffery obtained the £10,000 from *Joseph Hancock*, in consideration of which, on the 1st of June, 1869, the following promissory note of that date was given :—

"One day after demand in writing we jointly and severally, or any two, three, or more of us, promise to pay Mr. *Joseph Hancock* or order the sum of £12,150, with interest for the same from the day of the date hereof, at £5 per cent. per annum, value received.

"*Jas. R. Jeffery.*
"*Wm. S. Jeffery.*
"*J. & W. Jeffery & Co.*
"*S. P. Harris.*
"*A. C. Stewart.*
"*S. H. Day.*"

Harris, Stewart, and *Day* were not members of the firm. By arrangement with *Hancock* the sum was made repayable by instalments. The £10,000 was brought by *W. S. Jeffery* into the business, and some of the instalments were repaid by the firm, leaving £9894 16*s*. 9*d*. due. The payments were debited to the account of *W. S. Jeffery* in the books of the firm.

The firm having been adjudged bankrupt, *Hancock's* executors carried in proofs against the joint estate of the firm, and against the separate estates of *J. R. Jeffery* and *W. S. Jeffery*, and on the 2nd of August, 1871, on motion by the executors, Mr. Registrar *Pepys* made an order declaring that they were entitled so to prove, and ordering the trustees to admit the proofs accordingly, and pay dividends thereon out of the joint estate and the respective separate estates.

The trustees appealed.

Mr. *Little*, Q.C., and Mr. *Winslow*, for the Appellants :—

This is the first case under sect. 37 of the *Bankruptcy Act*, 1869, which has been substituted for sect. 152 of the *Bankruptcy Act*, 1861 (1), a section which was introduced into that Act in consequence

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(1) The Act of 1869, s. 37, was altered from the Act of 1861, s. 152, by omitting the words in brackets and inserting those in italics, in the following form :—

"If any [debtor shall] *bankrupt is*, at the [time] *date of the order* of adjudication, [be] liable [upon any bill of exchange or promissory note] in respect of distinct contracts as member of two or more distinct firms [carrying on separate and distinct trades, and having

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of the decision in *Goldsmid* v. *Cazenove* (1). The earlier section was confined to joint and several bills of exchange and promissory notes, the later extends to all joint and several contracts; but still they must be by members of a firm, the enactment does not apply to the common case of co-debtors. The earlier section declared that there should be a right to receive dividends; those words are omitted in the later, and we contend that this was designedly done in order to restore the law as it stood before 1861, and that the creditor, before receiving dividends, must elect whether he will receive them from the joint estate or from the separate estates, and cannot have them from both. Apart from bankruptcy, what would the right of the creditor be? Not to sue all jointly and each separately; he must choose which he will do, and the rule in bankruptcy was the same: *Ex parte Rowlandson* (2). So, if an obligee in a joint and several bond makes one of the obligors his executor the bond is discharged: *Cheetham* v. *Ward* (3). There may be a right to prove without a right to receive dividends: *Ex parte Bentley* (4). Section 32 requires that the debts shall be paid *pari passu*, and, according to the decision under appeal, that is not done: sect. 39 and Bankruptcy Rules, 1870, rule 76, support our contention. The 187th section of the Act of 1849 contains words which appeared to give a right to receive dividends from both joint and separate estates, yet the Courts have held that under that Act there was no such right. The construction which the Registrar has adopted makes the law very unfair to the separate creditors of the partners, and will encourage the practice of taking joint and several notes for partnership debts.

Mr. *De Gex*, Q.C., and Hon. *A. H. Thesiger*, for *Hancock's* executors, were not called upon.

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distinct estates to be wound up in bankruptcy], or as a sole [trader] *contractor*, and also [the] *as* member of a firm, the circumstance that such firms are in [the] whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof [and receipt of dividend] in respect of such [distinct] contracts against the [estates] *properties* respectively liable upon such contracts."

(1) 7 H. L. C. 785. 5 Jur. N.S. 1380

(2) 3 P. Wms. 405.

(3) 1 B. & P. 630.

(4) 2 Cox, 218.

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SIR W. M. JAMES, L.J.:—

I am of opinion in this case that the decision of the Registrar ought to be affirmed. The question depends upon the construction of sect. 37 of the *Bankruptcy Act*, 1869, which seems to me to be reasonably clear. The words are, "If any bankrupt is, at the date of the order of adjudication, liable in respect of distinct contracts, as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts."

The circumstances of the case before us are these: A gentleman of the name of *Jeffery* borrowed a large sum of money, in respect of which he was, beyond all question, "a sole contractor," within the meaning of the section I have mentioned. The person who lent the money required better security, and the firm of which the borrower was a member joined as sureties for him in a promissory note. Therefore there was a contract by the firm, and thus there were distinct contracts. There was the "joint contract" of the firm; the firm having joined in the security in the character of a firm in such a way that the members of the firm were not liable severally; but the firm was liable jointly. Then a certain member of the firm other than the original borrower, and certain strangers, have, in a distinct and several character as distinct individuals, put their names to a document by which each says, "I bind myself severally to pay this sum," and the consequence is "a distinct and several" contract binding upon him; and it is not the less a several contract because it and other similar contracts are put together into one instrument bearing one stamp. It is said that to uphold the decision of the Registrar in this case will be doing great practical mischief; but if people are allowed by law to take a joint and several security, it seems unreasonable that those who have given such a security should not be bound by it, according to its terms. It appears to me that the effect of our reversing the Registrar's decision would simply be to necessitate the use of a little more paper and a little more ink for the purpose of doing the same thing; for if the partners had given distinct promissory

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notes to the lender the case would have been clearly within the terms of the 37th section. It is urged that the section does not say that the creditor is to have a dividend from each estate; but the whole Act is framed on the plan of simply declaring the right of proof in each case, and then, by a single clause, it says, once for all, that a proof carries with it a right to a dividend. It would therefore have been objectionable to insert in the 37th section any declaration that dividends were to be paid on the proofs, as the doing so would have thrown doubt upon all the other sections from which such a declaration is omitted. It appears to me, therefore, that no argument can be based upon the omission of the words "and receipt of dividends." I am of opinion that the decision of the Registrar was right.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Before the passing of the Act of 1861, although a proof could be made against both the joint and separate estates where the bankrupts had executed a joint and several guarantee or bond, or entered into a joint and several contract, yet the creditor could not receive a dividend from both estates, and he had to elect from which he would receive the dividend. That was for the first time altered by a provision in the Act of 1861, which provision, however, was confined to bills of exchange and promissory notes. [His Lordship read the 152nd section of the Act of 1861.]

The insertion of the words "or as sole trader" made me feel some doubt on reading that section, whether it applied to every case of a bill of exchange drawn by a member of the firm on the firm, or of a joint and several promissory note, accepted by the members of a firm, or whether it only applied to a case where each separate person carried on a distinct trade; but it may be observed that before the end of the section the same class of persons who were previously called "sole traders" are called "sole contractors;" and probably nothing more was meant by "sole trader" than "sole contractor." But, however this may be, I think there can be no doubt that the enactment was intended to include a joint and several promissory note, and not to be confined to cases where the parties had executed separate instruments. Now

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we come to the Act of 1869, and I think that the plain intention of the Legislature was to carry the principle of the 152nd section of the Act of 1861 still further.

[His Lordship read the 37th section of the Act of 1869.]

The words "as a sole trader" do not here occur. The section speaks of a person liable as a "sole contractor, and also as a member of a firm." It is true it speaks of the joint liability as being the liability of "the firm;" the reason of which, I apprehend, is, that unless there is a firm there can be no joint estate. I should apprehend that the word "firm" would apply to every case where there was a joint estate. If persons who did not carry on business in partnership at all, either generally or in respect of a particular business, made a joint and several note, although they would be jointly and severally liable, there would be nothing but their separate estates to administer; there would be no joint estate. The words relating to a firm are not, as it appears to me, to prevent the words "sole contractor" and "joint contractor," according to the plain and ordinary meaning of words, from being applied to every joint and several promissory note. A joint and several promissory note being entered into, there are "joint contractors" and "sole contractors." It may be, no doubt, that as the joint and several contracts are comprised in one instrument, the creditor, if he sues the contractor jointly and gets a judgment, cannot afterwards sue any one of the same individuals in his separate capacity. The reason of this is, that such a second action is wholly unnecessary, because the creditor, under his joint judgment, may get executions against both the joint estate of all the persons against whom he has got judgment, and also against the goods of each of the persons separately. It appears to me that a joint and several promissory note, though it is one instrument, contains both a joint contract and distinct separate contracts by the several makers. It seems to me, therefore, to be within the plain meaning of the words of this section; and the only conclusion I can draw is, that it was the intention of the Legislature that wherever there was a joint and separate contract, and joint and separate estates being administered in bankruptcy, the creditor should be entitled to prove against both the joint and separate estates.

14 Ch D

It was urged, however, that the section only says that the

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creditor is to be entitled to prove, but does not say that he is to be entitled to receive a dividend; and it is urged that he is not entitled to receive it because the words expressly pointing at the receipt of dividends, which occurred in the former statute, have been omitted from the present; but if we examine the frame of the Act this argument will be found to have no weight. The Legislature, by a number of sections, deals with proofs, and lays down what proofs may be made. Thus, in the 31st section, after making an exception which I need not notice, it is provided that all debts and liabilities to which the bankrupt is subject at the date of the adjudication, or may become subject during the continuance of the bankruptcy, by reason of any obligation incurred before the date of the order of adjudication, shall be proveable. Then it states, in the 32nd section, that certain debts therein mentioned shall be paid in priority to other debts. Then the 33rd section deals with the case of apprentices of the bankrupt, and the 34th with the claims of landlords, making a distress available only for one year's rent, and providing that the landlord may prove for the surplus. Then the 35th section provides for proof of a proportionate part of a payment becoming due at stated periods, and sect. 40 relates to proof by a creditor holding security. Then after having gone through the classes of demands for which a person may prove, without saying anything as to receipt of dividends, the Legislature says, in sect. 41, that the trustee is to pay dividends among all the persons "who have proved." I therefore cannot doubt that the previous sections meant not merely to say that a person may go through the form of proof as to such demands, but may prove them for the purpose of receiving dividend.

Solicitors: Messrs. *Phelps & Sidgwick;* Messrs. *Linklater & Co.*

Ex parte DEWHURST. *In re* VANLOHE.

L. JJ.
1871
Dec. 14.

Bankruptcy—Uncertificated Bankrupt—After-acquired Property—Payment by Bankrupt—Following Money.

1QBD.14
148, 150,
7ChD.12
9QBD.8
11QBD.14

Money received by an undischarged bankrupt and paid away for value cannot be followed by the trustee, though the person to whom the money was paid had notice of the bankruptcy.

A bankrupt, who had not obtained his order of discharge, took a furnished house at £5 per week from a person who had notice of the bankruptcy, on the terms of paying six months' rent in advance if required. Having obtained a sum of £200 as compensation for being turned out of an appointment which he had taken since the bankruptcy, he paid to the landlord out of this sum £130 as the six months' rent, the landlord having required payment:—

Held (affirming the decision of *Bacon*, C.J., who had reversed the decision of the County Court of *Lancashire*), that though the trustee in bankruptcy could have intercepted the £200 and required it to be paid to him, he could not follow any part of it into the hands of the landlord.

THIS was an appeal by the trustee from a decision of the Chief Judge reversing an order of the County Court of *Lancashire*, directing Mr. *Southam* to pay to the trustee the sum of £130 received by him from the bankrupt for rent.

Vanlohe was adjudicated bankrupt on the 14th of September, 1870, and the Appellant was appointed trustee on the 6th of October. On or about the 27th of November *Vanlohe* entered into the employment of a Mr. *Rusden* at a salary. About the beginning of January, 1871, Mr. *Rusden* determined to dismiss *Vanlohe*, and on the 13th of January it was agreed between them that *Vanlohe* should leave on receiving £200 as compensation. Mr. *Rusden* accordingly on the same day paid him the £200, and out of this sum *Vanlohe* paid the £130 on the 30th of January, as after-mentioned.

Some time before Christmas, 1870, *Vanlohe* called on *Southam*, informed him of his engagement with *Rusden*, and asked him to purchase, at the sale under the bankruptcy, some of his (*Vanlohe's*) furniture in the house where *Vanlohe* was then residing, and to become tenant of the house and let it to *Vanlohe* as a furnished house. Mr. *Southam* accordingly purchased some of the furniture, and, on the recommendation of *Vanlohe*, was accepted as tenant of the house from Christmas, 1870. He let it to *Vanlohe*, as a furnished house, at £5 per week, under an agreement that six months' rent should be paid in advance, if required. About the 30th of January Mr. *Southam* heard that *Vanlohe* had lost his situation with Mr. *Rusden*, and required him to pay the six months in advance. The bankrupt accordingly paid him the £130 in question, not having yet obtained his order of discharge. Mr. *Southam* deposed that he had no notice, when he received the money, that the bankruptcy was not closed, or that *Vanlohe* had not got his order of discharge, and that he did not inquire where he got the money from, but supposed that he got it from Mr. *Rusden*.

On the 2nd of February, the bankrupt having been examined about this money, and having admitted the receipt of £175 from Mr. *Rusden* as indemnification for breach of contract, an order was made upon him to pay it to the trustee within a month. He did not pay it, and an application was made for his committal; but the Court made no order, being satisfied that he had no means of paying. On the 9th of May notice was served on Mr. *Southam* of an application to make him repay the £130; and on the 30th of June an order was made accordingly by the County Court Judge. The Chief Judge reversed this order, and ordered Mr. *Southam's* costs before the County Court to be paid by the trustee. From this order the trustee now appealed.

Mr. *De Gex*, Q.C., for the appellant:—

Under sects. 15 and 17 of the Act of 1869 the money received from *Rusden* vested in the trustee: 1 Will. 4, c. 56; *Plant* v. *Cotterill* (1); *Cartwright* v. *Glover* (2); the law being on a different footing from that on which it stood before that Act: *Copeland* v. *Stephens* (3). *Southam*, therefore, could not lawfully receive the money.

[The LORD JUSTICE MELLISH:—Have you any case at common law where an uncertificated bankrupt having received money—a legacy, for instance—and paid it away, the assignees have maintained an action for money had and received against the person to whom he has paid it?]

(1) 5 H. & N. 430.
(2) 2 Giff. 620. 7 Jur NS 857
(3) 1 B. & A. 593.

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In re VANLOHE.

Certainly if a bankrupt received a legacy and paid it into his bankers, the assignees could claim it.

[The LORD JUSTICE MELLISH:—I have no doubt that whenever the bankrupt could claim it, the assignees can stand in his place and claim it. But another question arises, when the bankrupt has parted with it under such circumstances that he cannot claim it back.]

The claim of the trustee is supported by *Elliot* v. *Clayton* (1) and *Beckham* v. *Drake* (2).

[He also referred to *Troughton* v. *Gitley* (3).]

Mr. *Bagley*, *contrâ*, was not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Chief Judge is quite right. Dealings with uncertificated bankrupts have been going on for centuries, and this is the first attempt to follow into the hands of the person receiving it money which has been paid away for value by an uncertificated bankrupt. The bankrupt, in the present case, has taken a house and paid rent for it out of money which, no doubt, the trustee had a right to intercept, and which, if he had given the proper notice, he probably could have intercepted. But he allowed the bankrupt to receive it, who paid his rent out of it, and now the trustee seeks to reclaim the rent from the landlord. Where are claims of this nature to stop, if this were to be allowed? On the same principle, if the bankrupt had paid his butcher and baker out of the money, the amount of what they had received might have been recalled from them. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Pritchard & Englefield*; Messrs. *Horne & Hunter*.

(1) 16 Q. B. 581. (2) 2 H. L. C. 579. (3) Amb. 630.

L. JJ.

1871

Dec. 14, 16.

Ex parte MEYER. *In re* STEPHANY.

Act of Bankruptcy—"Absenting himself"—Intent to Defeat or Delay Creditors—Bankruptcy Act, 1869, *s.* 6, *sub-s.* 3*—Failure to keep Appointment with Creditor.*

4 Ch. D. 558

A debtor promised to call at an appointed time on a creditor and pay the debt. Having failed to procure the money he did not call; but he was to be found at his own place of business:—

Held (affirming the decision of the Registrar), that the failure to keep the appointment did not constitute an absenting himself with intent to defeat or delay the creditor, and that no act of bankruptcy had been committed.

THIS was an appeal by the petitioning creditors from an order of Mr. Commissioner *Pepys*, sitting as Chief Judge, annulling an adjudication against *Stephany*, on the ground that there was no act of bankruptcy.

On the 6th of November *Meyer*, one of the petitioning creditors, called on *Stephany* at his place of business to ask for payment of a bill of exchange for £18, which had been returned to him dishonoured. *Stephany* told him that he would try to get the money and bring it him in the afternoon. *Stephany*, who had hopes of being able to raise the money, did not get it, and did not call on *Meyer*. In the afternoon of the same day a clerk of *Meyer's* called on *Stephany* at his place of business to ask for payment. *Stephany* told him he had not got the money, but would call on *Meyer* the following morning (the 7th) between eleven and twelve. He could not get the money, and did not call on *Meyer* on the 7th; but in the afternoon of that day the same clerk again called and saw *Stephany* at his place of business. *Stephany* told him that he was not then able to pay, but would call on him at twelve o'clock next day with the amount of the bill. He did not succeed in obtaining the money, and did not call. There were similar failures to call and pay the debts of the two other petitioning creditors.

On the 28th of October *Stephany* had been served with a twelve-day writ on a bill of exchange at the suit of his father-in-law. On the 9th of November, judgment having been obtained for £450 and costs, the father-in-law levied execution on *Stephany's* goods, and they were advertised to be sold on the 15th.

On the 14th of November *Meyer* and two other creditors presented their petition for adjudication, on the ground that the debtor had absented himself with intent to defeat or delay his creditors. This petition was ordered to be heard after the leaving a sealed copy at the debtor's usual or last-known place of abode. It was heard on the 16th, when Mr. Registrar *Pepys* made an order. The debtor applied for a rehearing, and on the 1st of December Mr. *Pepys* annulled the adjudication and ordered the petitioning creditors to pay the costs.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellants:—

There was a good act of bankruptcy under the *Bankruptcy Act*, 1869, s. 6, sub-s. 3, the language of which is the same as that of the enactment on the same subject in the earlier statutes: *Russell* v. *Bell* (1); *In re O'Neill* (2); *Curteis* v. *Willes* (3); *Tucker* v. *Jones* (4); *Gillingham* v. *Laing* (5); *Widger* v. *Browning* (6); *Hallen* v. *Homer* (7); *Ex parte Barney* (8). *In re O'Neill* is precisely in point, and *Tucker* v. *Jones* is nearly the same.

Mr. *Kay*, Q.C., and Mr. *Bagley*, *contrà*:—

If anything was done here to delay creditors, it was the making the appointment, not the breaking it.

[The LORD JUSTICE MELLISH:—That remark seems to apply to breaking an appointment at the debtor's own house, which is confessedly an act of bankruptcy.]

There is a broad distinction between the two cases, for if a debtor breaks an appointment at his own house, the creditors cannot tell where to find him; but breaking an appointment at a creditor's house cannot delay the creditor if the bankrupt is at home, and can be seen by the creditor at any moment. Here the debtor was never out of the way; the creditors could see him whenever they wished. The failing to keep an appointment cannot, at most, be more than *primâ facie* evidence of an intent to delay creditors; it may be explained; and here it is explained by the fact that the

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(1) 10 M. & W. 340.
(2) 9 Ir. Ch. 279.
(3) 1 Car. & P. 211.
(4) 2 Bing. 2.
(5) 6 Taunt. 532.
(6) 9 D. & R. 306.
(7) 1 C. & P. 108.
(8) 32 L. J. (Bkcy.) 41.

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debtor made the appointments in the *bonâ fide* belief that he should get the money, and stayed away because he failed to get it. In fact, the promise was not so much a promise to see the creditor as a promise to pay him, and the failing to keep that is not an act of bankruptcy. The cases do not intend to lay down a hard and fast line; it is a question for a jury whether there was an intention to delay creditors: *Ex parte Lavender* (1); *Lees* v. *Marton* (2).

Mr. *Robertson Griffiths*, for the execution creditor.

Mr. *De Gex*, in reply.

SIR W. M. JAMES, L.J.:—

In this case the act of bankruptcy alleged is, that the debtor absented himself with intent to defeat or delay his creditors. The Registrar was of opinion that he had not done so. We are asked to reverse that decision, and to hold that the debtor did commit the offence of which the Registrar has acquitted him. We have been referred to a long roll of cases, which are useful as regards the question of law, and they all result in this, that a man's intentionally keeping away from any place where he would, in the ordinary course of things, be, is absenting himself. But a debtor's absenting himself is no act of bankruptcy unless it be with intent to defeat or delay his creditors; and whether that intention exists, is a question of fact, as much as in any criminal case where the intent is necessary to constitute the crime. This question of fact is to be tried like any other question of fact. We have here to say, whether the absence of this debtor from the places where he appointed to meet his creditors was with an intent to defeat or delay his creditors. I not only am not satisfied that it was, but I am satisfied that it was not. The debtor made a promise to pay, but the breach of that was no act of bankruptcy. It is true he also said he would come to the creditor's place of business, but it is not alleged that the creditor wanted to see him; the debtor was to call and bring the money, and the promise substantially was, not that the debtor should be there, but that the money should be there. The rule of law is, that a man is taken to intend what is the necessary or natural consequence of his acts. Now if there was anything more likely than another to accelerate a creditor's movements it was his debtor's not coming to pay a debt when he had promised to do so. The debtor was to be found at his place of business; there was no difficulty in seeing him or in taking any proceedings against him; and it was impossible for the debtor to imagine that he was gaining a minute's time by failing to keep the appointment. I am of opinion that the appeal ought to be dismissed with costs.

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(1) 4 Dea. & Ch. 484.

(2) 1 Moo. & Rob. 210.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *E. A. Marsden*; Mr. *J. S. Salaman*.

L. JJ.
1872
Jan. 13, 22;
Feb. 13.

10 C P. 584

CHATFIELD *v.* BERCHTOLDT.

[1852 C. 31a.]

Legacy Duty—Estate pur autre vie—Rent-charge for Lives issuing out of Lands in England—Foreign Domicil—36 *Geo.* 3, *c.* 52, *s.* 20—*Wills Act* (1 *Vict. c.* 26), *s.* 6.

A testator gave a rent-charge, to issue out of lands in *England*, to *A.* for life, and directed that after her death it should be continued, and equally divided between *B.*, *C.*, and *D.*, during their lives and the life of the longest liver. *B.* died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of *A.*, who was survived by *C.* and *D.*, the Crown claimed from *B.'s* executors legacy duty in respect of *B.'s* third share of the rent-charge:—

Held (reversing the decision of *Bacon*, V.C.), that such duty was payable, for that the interest in the rent-charge which passed to *B.'s* executors was, by the *Wills Act*, "an estate *pur autre vie*, applicable by law in the same manner as personal estate," and therefore fell within 36 Geo. 3, c. 52, s. 20, and that it was not exempt from duty by reason of *B.'s* foreign domicil, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person.

THIS was a Petition by way of appeal from a decision of Vice-Chancellor *Bacon*.

The late Marquis of *Hertford*, by a codicil made in exercise of a power given him by a settlement to charge settled estates in *England* and *Ireland* with rent-charges to an amount not exceeding £700, limited a rent-charge of £700 to the use of *Louisa Dillon Strachan*, wife of Sir *R. Strachan*, to be issuing out of all the lands which he had power to charge, and he appointed to her for securing the annuity such powers of distress as landlords have for rent, and after her death he directed the rent-charge to be "continued and equally divided during their lives and the life of the longest liver to *Matilda Strachan*, *Charlotte Strachan*, and *Louisa Strachan*, the three daughters of the said Sir *R. Strachan*, in manner that when all three shall have died the hereditaments shall be discharged for ever of the same, but to continue payable with the powers and distresses mentioned above to these said children, my wards, after their mother's death, during their lives and the life of the survivor of them."

The testator died on the 1st of March, 1842.

Charlotte Strachan, afterwards Countess *de Zichy Ferraris*, died in 1851, domiciled in *Hungary*, and leaving an English will, and also an Hungarian will, the executors under which were not the same persons. By her English will she bequeathed her personal estate upon trusts for her sisters, the Countess *Berchtoldt* (*Matilda Strachan*), and the Princess *de St. Antimo Ruffo* (*Louisa Strachan*), and their respective children. This will was duly proved by *Chatfield*, one of the executors.

In 1852 this suit was instituted by the English executors for the administration of the estate of the Countess *de Zichy Ferraris.* In 1867 *Louisa Dillon Strachan* died. By an order of the 15th of June, 1870, made by the Lord Justice (then Vice-Chancellor) *James*, it was declared that, according to the true construction of the codicil, the three sisters, upon the death of their mother, became entitled to the rent-charge in equal shares as tenants in common, and that the one-third share of the Countess *de Zichy Ferraris* therein was vested in the Plaintiffs, as her legal personal representatives, upon the trusts of her English will.

The Commissioners of Inland Revenue having claimed legacy duty under the will of the Countess upon her third of the rent-charge, a Petition was presented by the Plaintiffs, as her legal personal representatives, to obtain the decision of the Court as to whether such duty was payable, and Vice-Chancellor *Bacon* decided that it was not. The case is reported (1), where the facts will be found in greater detail.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *W. W. Karslake*, for the Crown:—

We say, first, that the words of the statutes are strong enough to make duty attach even if this is personalty, but, secondly, that it is not personalty, but an interest in land on which probate duty is not payable, and which, by the law of nations, is regarded as "immoveable" property; thirdly, that by the law of this country it is immoveable property which does not follow the person. The title of the executor depends on the *Wills Act*, 1 Vict. c. 26, s. 6. This statute repeals the earlier enactments. If this is not an estate *pur autre vie* within the meaning of that section, the execu-

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(1) Law Rep. 12 Eq. 464.

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tors have no title. In *Bearpark* v. *Hutchinson* (1) it was held that rents were within 29 Car. 2, c. 3, s. 12, and the same must be the case under the recent Act. The interest, then, is within 36 Geo. 3, c. 52, s. 20, being "applicable by law as personal estate," and the words of 45 Geo. 3, c. 28, s. 4, are also sufficient to include it. If not, it is within 8 & 9 Vict. c. 76, s. 4, this latter Act having an extensive operation: *Attorney-General* v. *Marquis of Hertford* (2). It has been argued on the authority of *Utty Dale's Case* (3), and *Ross* v. *Aldwick* (4), that this is not an estate *pur autre vie*, because an estate for a man's own life is considered a greater estate than an estate for another man's; but those cases shew that a man, to whom an estate is given for his own life and the life of another person, and the survivor of them, has an estate *pur autre vie* which he can dispose of, though he is said technically not to have it in him. This, therefore, is an estate *pur autre vie*, which is made applicable as personalty, but is not made personalty, by the *Wills Act*, and being immoveable property it does not follow the person, so that *Thomson* v. *Advocate-General* (5) does not apply, and there is nothing to take it out of the words of the statutes which, if domicil were out of the question, would, as is admitted, impose legacy duty upon it.

[They also referred to the arguments for the Crown in the report of the case below.]

Mr. *Amphlett*, Q.C., and Mr. *Owen*, for the executors of the Countess *de Zichy Ferraris*.

Mr. *Schomberg*, Q.C., and Mr. *Macnaghten*, for the Countess *Berchtoldt* and her son; and Mr. *Fry*, Q.C., and Mr. *James T. Anderson*, for the Princess *St. Antimo Ruffo* and her daughter:—

The Solicitor-General contends that this, by the law of nations, is real estate, but we say that the quality of everything situate in *England* must be determined by the law of *England*.

[The LORD JUSTICE JAMES:—When this case was before me as Vice-Chancellor, I seem to have decided that this was English realty, for I held it to be vested in the English executors on the trusts of the English will; there being also an Hungarian will, and an Hungarian executor who was not before the Court.]

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(1) 7 Bing. 178.

(2) 14 M. & W. 284; 3 Ex. 670.

(3) Cro. Eliz. 182.

(4) Ibid. 491.

(5) 12 Cl. & F. 1.

We submit that by English law it is personalty, and must follow the domicil, for the statutes make it personalty: 29 Car. 2, c. 3; 14 Geo. 3, c. 20, s. 9; *Ripley* v. *Waterworth* (1); *Thomson* v. *Advocate General* (2).

[The LORD JUSTICE MELLISH:—Does the rule *mobilia sequuntur personam* apply to a chattel real?

The LORD JUSTICE JAMES:—If the argument of the Respondents is right, this property must be handed over to the Hungarian executor.]

This is not an estate *pur autre vie: Utty Dale's Case* (3); *Ross* v. *Aldwick* (4). But if it is, it is made personalty by the statutes: *Oldham* v. *Pickering* (5). The statute says it shall go and be distributed as personal estate, *i.e.*, according to the law of the domicil. In *Thomson* v. *Advocate-General* the distinction taken throughout is between real and personal estate, not between moveable and immoveable property. The Appellants first say that this is personalty for the purpose of charging it, and then say that it is realty for the purpose of getting rid of the effect of the foreign domicil. *Wallace* v. *Attorney-General* (6), and the cases cited in *Davidson's* Conveyancing (7) shew the effect of domicil. We say that if this is realty, it is not an estate *pur autre vie*, and that there are therefore no words in the Acts to charge it, but in fact it is personalty following the law of the domicil, and not liable to duty.

The *Solicitor-General*, in reply.

Feb. 13. SIR W. M. JAMES, L.J., delivered the judgment of the Court as follows:—

The facts which have given rise to the question in this case are

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(1) 7 Ves. 425.
(2) 12 Cl. & F. 1.
(3) Cro. Eliz. 182.
(4) Cro. Eliz. 491; 5 Rep. 13, a.
(5) 2 Salk. 464.
(6) Law Rep. 1 Ch. 1.
(7) Vol. iv. p. 264.

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fully stated in the report of the hearing before the Vice-Chancellor *Bacon*, from whose decision the appeal now to be disposed of has been brought before us.

One question which has been the subject of much argument before us is whether the rent-charge or annuity given to the Respondents is an estate *pur autre vie* or not. The Vice-Chancellor held that an estate *pur autre vie* is a mere technical expression which is not to be translated "for the life of another," but describes a thing known to the law. He proceeds: "I think, according to the authorities Mr. *Fry* referred to, this particular interest is not an estate *pur autre vie* in its technical meaning and signification. It is an estate which is to endure, no doubt, as long as three lives shall live, but it is not such an estate as is described in the Act as an estate *pur autre vie*."

We are unable to concur in this view.

It is, in the first place, difficult to reconcile this view as to the technical meaning of the word with the observations of Lord *Coke* (1). *Littleton* having said that "by *common speech* he which holdeth for term of his own life is called tenant for term of his life, and he which holdeth for term of another's life is called tenant for term of another man's life (tenant *pur terme d'autre vie*)," *Coke* observes: "Our author divides tenant for life into two branches . . . to this may be added a third, viz., an estate *both* for term of his own life and the term of another man's life—as, if a lease may be made to *A.*, to have to him for the term of his own life and the lives of *B.* and *C.*; for the lessee in this case hath but one freehold which hath this limitation during his own life and during the lives of two others. And herein is a diversity to be observed between several estates in several degrees, and one estate with several limitations; for in the first an estate for a man's own life is higher than for another man's life, but in the second it is not." In fact, the technical distinction between an estate for a man's own life and for another man's life is confined to the first case, that is, the case of estates in several degrees, and is the foundation of some nice technical learning as to the effect of feoffments, releases, and surrenders by a tenant for life to a tenant for life in remainder. For all other purposes an estate given to *A.* for his own life and the lives of others (probably the very commonest form of all) was exactly the same as an estate given to him for the lives of others only. If in either case he died before the expiration of the term, the estate continued, and was liable, when no special occupant was named, to the singular common law incident of general occupancy, and was capable of that peculiar limitation known as special occupancy. And when the *Statute of Frauds*, 29 Car. 2, c. 3, was passed, making estates *pur autre vie* by that name devisable, and, if not devised, chargeable in the hands of the heir when he is special occupant, and giving them, in case of no special occupant, to the executors or administrators to be assets in their hands, it would, in our opinion, have been shocking to common sense if a contention had been raised that that statute did not in and by the term "estates *pur autre vie*" include the unexhausted residue of an estate for the deceased's own life and the lives of others. Nor has any such contention ever been made, nor, from the time of the passing of the statute of *Charles* to the present day, has any doubt ever arisen as to such estates being devisable or being assets either in the heir's hands or in those of the executors or administrators. That this is an estate *pur autre vie* within the *Statute of Frauds*, that it is an estate *pur autre vie* within the statute 14 Geo. 2, c. 20, s. 9, and within the *Wills Act*, 1 Vict. c. 26, there can, we conceive, be no manner of doubt. And when, in the statute of the 36 Geo. 3, c. 52, s. 20, the expression "estates *pur autre vie* applicable by law in the same manner as personal estate" is used, it must mean the identical things which, under the same name and description, had been the subject of the previous Acts, making them applicable as personal estate.

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(1) Co. Litt. 41, b.

We are, therefore, clearly of opinion that the property in question is an estate *pur autre vie* within 36 Geo. 3, c. 52, s. 20. But then it was contended that by force of the several Acts, and the construction put on the statute 14 Geo. 2, c. 20, in the case of *Ripley* v. *Waterworth* (1), the character of personal property had been so impressed upon this interest that it must be taken to be, to all intents and purposes, personal property, which would be attached to the person and domicil of the deceased owner, and that the domicil being in this case Hungarian, it must be treated as Hungarian moveables; and therefore, according to the decision in *Thomson* v. *Advocate-General* (1), subject to the implied exception in all our fiscal laws in favour of purely personal property passing by and according to the law of the domicil, and not according to our law.

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(1) 7 Ves. 425.

Beyond all question, however, this property is, by the common law of *England*, purely real estate, as much real estate as if, instead of being a rent-charge issuing out of land, land itself to the annual value of the rent-charge had been given. And the question is, in our judgment, as to this rent-charge, to be considered and decided in exactly the same manner as if there had been a limitation of Whiteacre to the same persons in the same terms.

Then what is there in the Acts to change the nature of the property?

In the hands of the heir, as special occupant, it would have been his freehold, giving him all the qualifications of a freeholder; even in the hands of the executor or administrator it could only formerly have been conveyed by the assurances requisite for the transfer of freehold land; if an executor or administrator had assented to the devise of it, the devisee would have taken it as a freehold, and would have had all the qualifications of a British freeholder. The statutory provision is not that it shall be personal estate, but that in certain circumstances, and certain circumstances only, it shall be applicable as personal estate. *Simile non est idem.* It lay on the Respondent to shew that by the law of *England* estates *pur autre vie* in land had been converted into pure personalty or moveables; and we are of opinion that he has not discharged this burthen by shewing that by some statutory provisions in some cases they are to be applied in the same manner as personal estate.

We are of opinion, therefore, that the case does not fall within the principle of the case of *Thomson* v. *Advocate-General.* It is to be dealt with as English real estate *pur autre vie*, and that leaves the following question: Is it an estate applicable by law in the same manner as personal estate? Under the statute of 29 Car. 2, c. 3, as recited, construed, and enlarged in and by the statute 14 Geo. 2, c. 20, the estates which were to go, be applied, and distributed in the same manner as the personal estate of the testator or intestate, were estates *pur autre vie*, of which there shall be no special occupant, and of which no devise shall have been made.

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(1) 12 Cl. & F. 1.

If the case had rested there, we should have thought that the case would have been an ordinary case of a devise of real estate to tenants in common, which would not have been subject to legacy duty. But the *Wills Act* is express that in all cases where there is no special occupant of any estate *pur autre vie*, it shall go to the executor or the administrator of the party that had the estate thereof by virtue of the grant. Then it is now "an estate *pur autre vie*, applicable by law in the same manner as personal estate;" and it is enacted that such an estate shall be charged with the duties by the Act imposed as personal estate. It is, in our judgment, immaterial that there has, since the Act imposing the duty, been a change of the law, making some things applicable as personal estate which were not so before; the duty is imposed on things constituting by law a distinct category; whatever by the law for the time being is included in the category, is subject to the charge; whatever by the law for the time being is excluded from the category, is exempt from the charge. We are, therefore, of opinion that, being an estate *pur autre vie* now applicable by law as personal estate, it is liable to legacy duty as personal estate.

We do not think it a case for costs.

Solicitors: *The Solicitor to the Inland Revenue;* Messrs. *Davies & Williams;* Messrs. *Capron, Dalton, & Hitchins;* Messrs. *Farrer, Ouvry, & Co.*

L. JJ.
1871
Nov. 2, 3.

In re ORIENTAL COMMERCIAL BANK.

MORRIS' CASE.

Winding-up—Past Shareholder—Class B—Companies Act, 1862, *s.* 38.

13 Eq. 389
7 Ch 635,
5 HL 714, 739
11 Ch D. 389

Held (reversing the decision of *Bacon*, V.C.), that, in estimating the debts for which contributories in Class B (past members) are liable, all sums paid in respect of those debts in the course of the winding-up must be deducted; and in estimating what sums have been so paid, the assets (including the calls on the A contributories) are to be treated as applied in payment *pari passu* of all the debts:

Held, also, that the contributions of B contributories are to be applied in payment of the debts to which the B contributories are respectively liable.

Statement of the rules according to which the amount of liability of each of the B contributories is to be ascertained.

Varied on re-hearing 4 R&C 601

THIS was an appeal by *Morris*, a contributory of the *Oriental Commercial Bank*, in the B Class, from a decision of Vice-Chancellor *Bacon*.

Morris was the holder of fifty shares in the bank. On the 6th of November, 1865, he duly transferred these shares to *Demetrio Pappa*, who was the registered holder at the commencement of the winding-up of the bank in July, 1866. *Pappa* was settled on the A list of contributories, but had paid no calls, had become bankrupt, and his estate had paid no dividend. The total amount remaining to be paid up on these shares at the date of the winding-up was £800, nothing having been paid on them since the transfer.

At the date of *Morris's* transfer the bank was indebted to a large amount, as also at the time of the winding-up; but by the time of the commencement of the winding-up the old liabilities existing at the time of *Morris's* transfer had all been wiped out, with the exception of debts amounting in the whole to £642 5*s.* 9*d.* The assets of the bank, including the moneys actually raised by calls on the contributories in Class A (the members at the time of winding-up), were sufficient to pay 15*s.* in the pound on all the debts of the bank. It was found that nothing more could be obtained from the A contributories, many of them having become bankrupt or insolvent, and a list was therefore made out of B contributories, being the former holders of shares who had transferred them within a year before the winding-up. The total amount remaining to be called up on the shares in respect of which they were put upon the list, was £64,492.

A summons was then taken out by the official liquidator to have it determined on what footing calls were to be made on the B contributories. The summons suggested three principles:—

1. That each contributory in Class B was liable (to the extent of the amount remaining unpaid on his shares) for the total amount of the bank's indebtedness when he transferred his shares;

2. Or that each contributory in Class B was (to the extent of the amount unpaid on his shares) liable rateably with the other B contributories for his proportion of the debts of the bank which were owing when he transferred his shares, and which remained owing at the commencement of the winding-up;

3. Or that each B contributory was (to the extent of the amount unpaid on his shares) liable rateably with the other B contributories for such debts of the bank as were due when he transferred his shares, and remained due at the commencement of the winding-up, deducting therefrom the dividends paid in respect of those debts under the winding-up.

Vice-Chancellor *Bacon* made an order declaring it to be the opinion of the Court "that each contributory of Class B is liable to contribute to the assets of the bank (but so as no call be made in excess of the amount now unpaid on the shares held by him) rateably with the other B contributories to the extent of the debts which were owing by the bank when he transferred his shares, and which remained owing at the commencement of the winding-up, without any reduction in respect of the dividends upon such debts already paid by the liquidator in the course of the winding-up out of the contributions made by the contributories of Class A since the commencement of the winding-up, and the other assets of the said bank."

Mr. *Fry*, Q.C., and Mr. *Westlake*, for the Appellant:—

We say, first, that the liability of B contributories is confined to so much of the debts due when they respectively parted with their shares as remains due after allowing for everything paid in respect of those debts, either while the company was a going concern or during the winding-up. The case mainly turns on sect. 38 of the *Companies Act*. *Brett's Case* (1) in substance decides the point. If the A contributories pay these debts in full, then, according to *Brett's Case*, there is no further liability; but according to the decision of the Vice-Chancellor in the present case, if a shilling in the pound on them is left unpaid, the B contributories are liable to the extent unpaid on their shares to pay the whole amount of those debts. This cannot be. How can the B contributories be called upon to pay the whole of a debt when part of it has been paid by the parties primarily liable? Secondly, we contend that the liability of each B contributory must be exhausted before one who parted with his shares before him is resorted to. Every transferee comes into the concern as a going concern, taking to it with its liabilities: *Baird's Case* (2). He thereupon becomes liable, along with the other then shareholders, in exoneration of all those who have parted with their shares, and this liability continues. In *Brett's Case* it was considered that the analogy of ordinary partnerships was to be taken into account in construing the statute; and the case is like that of a partnership agreeing to indemnify an outgoing partner. If, then, another partner retires with a similar contract for indemnity from the continuing partners, he still is liable in priority to the one who first retired.

[The LORD JUSTICE JAMES:—Suppose a debt of £10,000, for £8000 of which *A.* is surety, and afterwards *B.* becomes surety for £6000 of it. Can *A.* require *B.* to be resorted to first?]

The case is not one of principal and surety, but of a statutory liability: *Helbert* v. *Banner* (3); *Hudson's Case* (4).

[*Andrews' Case* (5), *Weston's Case* (6), and *In re Accidental and Marine Insurance Corporation* (7), were also referred to as to the position of B contributories.]

Mr. *Kay*, Q.C., and Mr. *Kekewich*, for the official liquidator, were desired to confine themselves to the first point:—

Whatever the decision be, the B creditors will not be paid in full; for though, no doubt, the B contributories can pay the amount required, it will go to the general assets.

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(1) Law Rep. 6 Ch. 800.

(2) Ibid. 5 Ch. 725.

(3) Ibid. 5 H. L. 28.

(4) Law Rep. 12 Eq. 1.

(5) Ibid. 4 Eq. 458; 3 Ch. 161.

(6) Ibid. 6 Eq. 17.

(7) Law Rep. 5 Ch. 428.

[The LORDS JUSTICES intimated that this was opposed in principle to *Brett's Case.*]

In *Helbert's Case* (1), the decision in which was affirmed by the House of Lords (2), the Master of the Rolls held the contributions of the B contributories to be general assets.

[THEIR LORDSHIPS expressed dissent from this view.]

Then as to the question what they are to pay. We submit that, when B contributories have once become liable to be called upon, they must, to the extent of their liability, contribute rateably with Class A to the past debts: *In re Accidental and Marine Insurance Corporation* (3).

[The LORD JUSTICE MELLISH:—We do not think that that decision can stand with *Brett's Case.*]

Then the question arises, what is to be done if an A contributory cannot pay the calls. Is the former holder to be resorted to, or must the other A contributories make up the deficiency?

[The LORD JUSTICE JAMES:—We are of opinion that the A contributories are, up to the extent of their liability, primarily liable for everything.]

Mr. *Eddis,* Q.C., and Mr. *Higgins,* for the creditors' representative.

NOV. 3. SIR W. M. JAMES, L.J.:—

In this case an application was made by the official liquidator for the purpose of obtaining the opinion of the Court upon the question as to the extent and application of the funds which were to be contributed by the shareholders in what is ordinarily called, in these cases, class B—that is, those persons who had been shareholders within a year before the winding-up, but had ceased to be shareholders at the time of the winding-up. The Vice-Chancellor was of opinion that they were liable to the whole extent of the

(1) Law Rep. 6 Eq. 509.
(2) Law Rep. 5 H. L. 28.
(3) Law Rep. 5 Ch. 428.

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debts due at the time they respectively ceased to be shareholders, and which remained due at the commencement of the winding-up, without making any deduction in respect of the dividend which had been paid in the course of the winding-up. We are of opinion that that view is not an accurate view, and that, in truth, it is directly in contravention of the judgment of the full Court in *Brett's Case* (1), in which it was held that the liabilities of the ex-shareholders, and the rights of the creditors who were creditors at the time when they ceased to be shareholders, concerned only those two classes; and that there was no right or equity whatever either in the company, the existing shareholders, or the subsequent creditors to interfere in any arrangement they mght make between themselves for the satisfaction or release of those liabilities. It appears to us utterly inconsistent with that to hold that there is to be a marshalling of the assets for the purpose of getting some more funds into the coffers of the liquidator for the purpose of paying a larger dividend to those creditors who have already received certain dividends. The question was very fully considered at that time; and it appears to me that the conclusion then arrived at was clearly in accordance with the provisions of the *Companies Act*. The company's assets are to go, in the first place, in payment of their debts. The company's assets include, of course, all the unpaid capital that is recoverable from the existing shareholders; and, according to the 133rd section, which is a direction given in cases of voluntary winding-up, the whole assets of the company, which, of course, include the unpaid capital, are to be applied *pari passu* in payment of all the creditors; evidently intending that the liquidator was not to pay some only of the creditors in order that others, who had particular claims on particular shareholders, might obtain a larger amount from those shareholders. It appears to me that the direction of the Vice-Chancellor, that the dividends received in the course of the winding-up are not to be taken into consideration, is erroneous, and ought to be struck out of the order.

5H£724

Then it was contended, on the part of the Appellant, that we were to apply the principle further, and to say that each class of ex-shareholders was to be exhausted before going back to an earlier class of shareholders. That appears to me not to be construing any words in the Act, but to be making an Act. The liability of the ex-shareholders is a liability entirely created by statute, and there is nothing in the Act of Parliament which gives any such right or equity as this; nor do I see how it can arise. No doubt every transferor of a share has a right to be indemnified by his transferee, but no transferor has any equity against the holder of other shares; he has no right or equity in respect of that. The result is, that each ex-shareholder is liable to contribute in respect of those debts which were debts at the time when he ceased to be a shareholder. It has been urged that there is a difficulty in working this out; but the Lord Chancellor, in *Brett's Case* (1), said it appeared to him that there really could be no difficulty in ascertaining how the funds were to be applied and distributed; and in this I fully concur. There may be a great number of sums in arithmetic to be worked out for the purpose, but that is the only difficulty; and if there is one thing in which an official liquidator is especially required to be skilful, it is the making all arithmetical calculations that may be required.

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(1) Law Rep. 6 Ch. 800

The mode in which the principle is to be applied may be simply thus exemplified. Let us take the simplest possible case, that of *A.*, *B.*, and *C.*, three ex-shareholders, and suppose that the debts due when *A.* retired and remaining unpaid, to which he is liable to contribute, amount to £100; that the debts due when *B.* retired, at a later date, and remaining unpaid, to which debts *B.* is liable to contribute, amount to £200, being the first £100 with £100 more; and that the debts due when *C.* retired, and remaining unpaid, amount to £300, being the same £200 with £100 more; *C.* then must pay the whole of the last £100; *B.* and *C.* must contribute to make up the next £100; and *A.*, *B.*, and *C.* must contribute to make up the first £100. Now, assuming that *C.*, being called upon to pay, is unable to pay the whole amount of his liability, what he actually does pay must be apportioned *pro rata* between the last £100 and the contributions which he ought to have paid towards the other two sums of £100 respectively. *B.* then, to the extent of his liability, must pay what remains of the second £100, and contribute rateably with *A.* to what remains of the first £100. If

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(1) Law Rep. 6 Ch. 800.

B. fails to pay all that he ought, then *A.*, to the extent of his liability, must pay the whole that would then remain of the first £100. In that way there would be a certain degree of marshalling, that is to say, it is the right of each party to call upon the other parties jointly liable with him to the same debt to contribute to that debt. *C.* is under a liability as to the whole of the £300, *B.* as to the £200, and *A.* only as to the £100; each must contribute rateably with those liable with him to each sum in respect of which they are jointly liable. There seems to me to be no difficulty in working that out, except the difficulty that I mentioned before, of making a great number of sums, and ascertaining the exact number of debts, and the exact number of contributories liable in respect of each debt.

5 H.L. 708

I think the order of the Vice-Chancellor should be varied so as to reduce the amount of debts in respect of which the B contributories are liable to contribute by the dividends upon such debts already paid by the liquidator in respect of the winding-up out of the contributions made by the contributories of class A since the commencement of the winding-up, and the other assets of the bank; and there should be a declaration that the funds contributed by the B contributories are to be applied in payment of the debts to which the B contributories are respectively liable.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

By the order, as finally settled, it was ordered that the order under appeal should be varied, and as varied should be as follows:—

"This Court being of opinion that each contributory of Class B is liable to contribute to the assets of the company (but so as no call be made in excess of the amount now unpaid on the shares held by him) rateably with the other B contributories to the extent of the debts which were owing by the company when he transferred his shares, and which remained owing at the commencement of the winding-up, and now remaining owing after the application of the contributions made by the contributories of class A since the commencement of the winding-up, and of the other assets of the company. And their Lordships do declare that for the payment of each debt a call must be made on those contri-

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butories who transferred their shares after it was contracted; and that the sums contributed by the B contributories respectively be applied exclusively in payment of the debts which were incurred before the dates of the respective transfers, and remained unpaid at the commencement of the winding-up."

Solicitors: Messrs. *Ashurst, Morris, & Co.;* Messrs. *Uptons & Co.;* Messrs. *Crosley & Burn.*

L. JJ.
1871
Dec. 22.
1872
Jan. 12,
Feb. 13.

22ChD71

In re CONTRACT CORPORATION.

GOOCH'S CASE.

Winding-up—Practice—Production of Documents—Affidavit—Official Liquidator.

The official liquidator of a company is in the position of a receiver or manager of partnership assets appointed by the Court. Where he represents the company in a suit against strangers, or in a proceeding in the winding-up against an alleged contributory, the adverse party has a right to the same discovery from him as from an ordinary litigant. But where the question is whether a past shareholder is to be placed on list B, and, if so, what is the extent of his liability, that being a question which does not concern the company, the official liquidator is only bound to afford equal facilities to the shareholder and the creditors, but not to make discovery at the instance of either party.

The decision of the Master of the Rolls reversed.

Observations on *In re Barned's Banking Company, Ex parte Contract Corporation* (1).

THIS was an appeal from an order of the Master of the Rolls made in the winding-up of the *Contract Corporation, Limited* directing the official liquidator to make an affidavit as to the documents in his possession.

In January, 1865, Mr. *Gooch* transferred his shares in the company to a person named *Adams*. In August following *Adams* transferred his shares to *Dove*, and in December, 1865, *Dove* transferred them to *Beal*.

On the 22nd of March, 1866, the Petition was presented under which the company was ordered to be wound up, at which time *Beal's* name was on the register as holder of the shares.

Adams and *Dove* were both infants, but *Beal* was of full age.

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(1) Law Rep. 2 Ch. 350.

Under these circumstances the official liquidator sought to put *Gooch* on the list of contributories, on the ground that his transfer to *Adams* was invalid, and that he still remained a shareholder; and in the alternative of the defect in the transfer being held to have been cured by the subsequent dealings with the shares, he sought to put *Gooch* on the B list of past members, on the ground that he remained a member till December, 1865, when the transfer to *Beal* was made.

In support of his defence to this alternative claim, *Gooch* called upon the official liquidator to make an affidavit as to all documents in his possession relating to the questions at issue. The Master of the Rolls made the order asked for, considering that the official liquidator was in the same position as an ordinary Defendant; and from this decision the official liquidator appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the Appellant:—

The official liquidator is not a litigant; he is merely an officer of the Court; and the documents in his possession are in possession of the Court in the same way as if they were deposited with the Clerk of Records and Writs. It is his duty to give every facility both to contributories and creditors, but he could not make such an affidavit as is required of him without a complete examination of all the books and other documents of the company, which would enormously increase the costs and delay of a winding-up. This would be especially the case in questions relating to the B list, for the particulars of each creditor's debt would have to be gone into. The practice of litigants in a Chancery suit bears no analogy to the present case; for in Chancery there are pleadings which raise specific issues. But here every defence is open, and the official liquidator could not know to what particular points to direct his search. The contributories are in the position of partners; they are entitled to free access to the partners' books, but they must search them themselves, and cannot call on the other partners to make an affidavit of their contents.

[They referred to the *Companies Act*, 1862, ss. 92, 94, 99, 154, 156. Gen. Ord. of November, 1862, rules 58, 68, 74.]

Mr. *Morgan*, Q.C., and Mr. *Bagshawe*, for Mr. *Gooch*:—

The official liquidator is not merely an officer of the Court; he stands in the place of the directors; the property of the company is under his control, and in litigious proceedings he is in a position analogous to the secretary or other public officer of a company who is made a party for purposes of discovery; *In re Barned's Banking Company, Exparte Contract Corporation* (1). In the ordinary practice in Chancery the duty of making such an affidavit, and the right to require it, are extended to persons not formally parties, such as the officers of a company: *Ranger* v. *Great Western Railway Company* (2); *Rochdale Canal Company* v. *King* (3); and to creditors: *In re M'Veagh* (4). In the present case the real contest is respecting *Gooch's* liability as a past member, and the litigation is between him and a particular class of creditors. The official liquidator represents for this purpose that particular class; they do not appear and contest the question themselves: *Weston's Case* (5). The inconvenience alleged is no answer to the application. It is the duty of the official liquidator to be well acquainted with the documents; and all we want to know is, which of the debts to which *Gooch* was liable have been paid off, and which are in existence.

[They also referred to the 11 & 12 Vict. c. 45, s. 118; the *Companies Act*, 1862, s. 94; 15 & 16 Vict. c. 86, s. 18.]

Mr. *Chitty*, in reply.

Feb. 13. SIR W. M. JAMES, L.J., delivered the judgment of the Court as follows:— 1872

This is an appeal from an order of the Master of the Rolls directing the Appellant, the official liquidator of the company, to make an affidavit as to the documents in his possession.

The Respondent is a person who is sought by the official liquidator to be placed on the list of contributories, on the ground that an alleged transfer made by his testator, being to an infant, was a nullity, and that he continued to be a shareholder.

There was an alternative claim under these circumstances. The

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(1) Law Rep. 2 Ch. 350.
(2) 4 De G. & J. 74. 5 Jur NS 1191
(3) 15 Beav. 11.
(4) 1 D. J. & S. 399. 9 Jur N.S. 940
(5) Law Rep. 6 Eq. 17.

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infant himself made a transfer, which was accepted and registered, and there have been subsequent dealings with the shares, and it is suggested that if these dealings with the shares preclude the right to go back to the original void transfer, and treat all subsequent dealings as avoided, at all events there was a time during which the infant alone was the nominal shareholder, and during that time the transferor is liable to be, as the then shareholder, placed on list B.

This is the contention on the one part; on the part of the Respondent he, of course, denies that his testator was a continuing shareholder, and, with respect to the claim to put him on the list B, he alleges that the statutory requisites do not exist; that is to say, that there are no debts of the company dating back beyond the time at which he ceased to be a member—at least none which there were not assets of the company sufficient to discharge.

It is with a view to discovery in support of this contention that the Appellant is asked to make the affidavit as to documents.

The argument of the Appellant is, that he is not a litigant, or in the position of a litigant, with respect to the questions at issue; that he is an officer of the Court, and nothing but an officer of the Court, who has neither power nor duty to do anything except under the orders and directions of the Judge, and that his possession of the books and papers of the company is, in truth, as much the possession of the Court by him as if they were deposited with the Clerk of the Records and Writs, or with any other officer of the Court.

It has been pointed out to us that by the Act of Parliament provision is made for giving to any person interested access to all the books and papers in the liquidator's possession; and it has been argued with great force before us that if, in every question to be settled in the winding-up of a company, every creditor, every contributory, every officer of the company, is entitled *ex debito justitiæ*, to treat the official liquidator as a litigant, and to compel him to make discovery, and for the purposes of such discovery to make the necessary examination of all the books and papers in his custody, in order to ascertain which of them relates or contains entries relating to the matter in controversy, it would add enormously and fearfully to the costs, already enormous and fearful, of a winding-up.

We think that there is very great weight in the considerations so presented to us: a winding-up is, in truth, a partnership suit, and the official liquidator is the receiver and manager of the partnership assets, and also fills the character of an accountant to make up the books and accounts, so as to ascertain each partner's share of liability and share of surplus, if there should be any. And it would certainly be a very novel thing to treat a receiver and manager appointed by the Court, or an accountant appointed by the partners themselves, as a person liable to be treated as a Defendant for the purposes of discovery. And we can find nothing in the Act of Parliament which authorizes an official liquidator to be treated otherwise than such a receiver, or manager, or accountant would be liable to be treated. The express provision that the official liquidator is to act in every respect under the authority of the Court would seem, on the contrary, to shew that there can be no necessity for treating the liquidator as a litigant Defendant. In truth, it is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding-up. He should have no leaning for or against any individual whatever. It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect.

If a person interested in any such case desires to see any books or papers, it is the duty of the liquidator to give him not only access to them, but to give him every assistance and facility in finding out which are the relevant books and papers he requires; and if the liquidator has already ascertained any books or papers bearing on the subject, he should frankly place this information at the service of the party. But this is a very different thing from the liquidator being obliged, at the instance of every person interested in every question arising, to employ that time which, unfortunately, is so costly to the contributories, in making that fresh and careful investigation of the papers and documents in his pos-

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session which would be requisite to enable him truthfully to make the ordinary affidavit which is required from a party or *quasi* party called on to make discovery.

Our attention, however, has been called to the language of the Lords Justices in a case relating to this very company, *In re Barned's Banking Company, Ex parte Contract Corporation* (1); who, in their observations, refer to the liquidator as being in a position analogous to the secretary or other public officer of a corporation made a Defendant for the purposes of discovery, and who is compellable to make the same discovery as a Defendant proper would be compelled to make.

The point which actually arose in that case was, whether an official liquidator examined as a witness could protect himself from answering; and it was held that he could not. We see no reason to dissent from that decision; nor from the reasons or observations of our predecessors when rightly applied to the proper kind of case.

Among the other duties of an official liquidator, it may fall to him to represent the company as a party litigant. The company can only sue or be sued through his agency, and where there is such a suit, or where there is in the winding-up a proceeding, which is in substance, though not in form, a bill or action by or against the company, then, from the very necessity of the case, the adverse party has a right to deal with the official liquidator as the litigant, and to obtain from him the same measure of discovery in the same manner as he would from any other litigant. That is the principle of that case, and that principle sufficiently indicates the limits of its application.

It has, however, in our judgment, no application, except to a very limited extent, to the case before us. So far as there is any question whether the Respondent is or is not still liable to be put on the list as an actual present shareholder, that is a question between him on the one side and the company on the other; and the Respondent is entitled to have, if he requires it, the usual discovery as to that liability, that is to say, a discovery of everything relating to the particular shares in question since the transfer by the Respondent to the infant out of which the question arises. But with regard to the real question between the parties, viz.,

(1) Law Rep. 2 Ch. 350.

whether the statutory requisites exist for placing the Respondent on list B, and if so, what is the extent of his liability; that is a question with which the existing company has really no concern. That company must pay to its uttermost farthing in any event. And whether beyond the claim against the company any particular creditor or creditors has or have claims against any past member or members of the company, is a question as to which every creditor may have his hand against every other creditor, and against every past shareholder; and every past shareholder may have his hand against every other past shareholder, and against every creditor. The official liquidator, as the officer of the Court, is bound to see that in this free fight everybody has a fair field and no favour, and to act strictly in the interests of truth and justice, and none other. But the official liquidator, as the representative of the existing body, is no party, or *quasi* party, either for discovery or otherwise, to any such litigation.

This case, in truth, shews how impossible it would be to proceed with a winding-up if this distinction were not observed. The real controversy is whether there were, at a particular date, debts which have not been since discharged wholly or partially, and which there are not or were not assets available to satisfy. The discovery sought would be a discovery of all the books and papers relating to every debt due or claimed at that date, and to everything done subsequently with reference to such debts, and all the books and papers shewing the assets of the company, which are or ought to be forthcoming.

We are of opinion that the order of the Master of the Rolls should be discharged; but if the Respondent desires it, we will substitute for it an order on the official liquidator, to make the usual affidavit as to documents relating to the particular shares, in respect of which he is sought to be placed on the list of present contributories. There will be no costs, but the official liquidator will take his out of the estate.

Solicitors for the Appellant: Messrs. *Linklater, Hackwood, & Co.*
Solicitor for the Respondents: Mr. *H. W. Vallance.*

L. JJ.
1872
Jan. 25, 27.

Ex parte HAWKER. *In re* KEELY.

Bankruptcy—Assignment of all Debtor's Property—Substantial Exception—Pension from the East India Company.

Port 308
5 Ch [illegible]
16 Eq 403
Ch D. 62
18 Ch D. 38, 46
1 Ch D 87
2Ch D 790
3Ch D 635

A debtor executed as security for an antecedent debt of £1500, an assignment which included all his property of any appreciable value, except a pension of 10*s.* 6*d.* a day to which he was entitled as a retired servant of the *East India Company*:—

Held (affirming the order of *Bacon*, C.J.), that as this pension would not pass to a trustee in bankruptcy, and could not be taken in execution by a creditor, it constituted no substantial exception from the assignment, which, being an assignment of substantially the whole of the debtor's property, was an act of bankruptcy.

THIS was an appeal by an execution creditor from an order of the Chief Judge refusing to discharge an injunction granted by the Registrar of the County Court of *Cornwall.*

On the 7th of July, 1871, *Hawker*, the Appellant, signed judgment in an action against *Keely* for £49 10*s.* 9*d.* debt and costs The poundage made the total amount a little over £51. On the 11th of July he issued execution, and seized goods sufficient to satisfy the execution. On the 13th of July *Keely* filed a declaration of inability to pay his debts, and took proceedings for the liquidation of his affairs by composition or arrangement, and on the same day obtained an *interim* injunction restraining *Hawker* from further proceedings under the judgment, and appointing the 22nd of July for him to shew cause why he should not be absolutely restrained. On the 22nd the Registrar granted an absolute injunction to restrain the bailiff of the County Court from selling the goods under the execution. On the 9th of August the first meeting of creditors was held, and refused to accede to liquidation by arrangement. The result of a second meeting was the same, and ultimately, on the 13th of September, *Keely* was adjudicated bankrupt; the adjudication being founded on the declaration of the 13th of July.

Hawker appealed to the Chief Judge, and when the appeal came on the Chief Judge was of opinion that the injunction could not, on the above materials, be sustained; but by arrangement the case was adjourned to allow the trustee to bring forward circumstances which made a new case, viz., that *Keely* had committed an act of bankruptcy on the 8th of July, by giving a bill of sale comprising the whole of his property to secure an antecedent debt.

It appeared that *Keely* was indebted to the *Liskeard Bank* in £1500 on three bills of exchange which had been dishonoured, and he accordingly executed the bill of sale in question to *N. Male*, the manager of the *Camelford* branch of the bank. This bill of sale was an absolute assignment, as upon a sale to *Male* for £500, of all *Keely's* household furniture, goods, chattels, and effects then being in, or upon, or belonging to the messuage, garden, and premises then in *Keely's* occupation, and the horses, cattle, sheep, pigs, crops, corn, hay, straw, consumable stores, agricultural implements, carts, carriages, and farming utensils, live and dead stock, goods, chattels, and effects then being in or upon the several lands and premises in the occupation of *Keely* in the three parishes therein mentioned, the particulars of which were set forth in a schedule, and all other the goods, chattels, and effects of *Keely* in those three parishes.

Keely had retired from the service of the *East India Company*, and had a retiring pension of 10*s*. 6*d*. a day. Evidence was given that he had some landed property at *Rangoon*, but nothing was shewn as to its value. It was also deposed that he was lessee of a house on which he had covenanted to expend, and had expended, £200, of which lease, commencing in 1869, there were about twelve years to run; but the solicitor of the trustee deposed that these premises had been made over by *Keely*, with the privity of the landlord, to *Caroline Keely*, and would only revert to *Keely* in the event of his surviving her. *Keely* was also tenant, at a rack rent, of some lands, which he farmed, but his interest in them was rejected by the trustee as valueless. *Keely* had, to a small extent, sold manure at a commission, and his dealings in manure were relied on as trading. The above particulars, and the chattels mentioned in the bill of sale, were the whole of his property.

In this state of circumstances the Chief Judge held the assignment to be an act of bankruptcy, and refused to dissolve the injunction.

L. JJ.
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Ex parte HAWKER.
In re KEELY.

Mr. *Kay*, Q.C., and Mr. *Bagley*, for the execution creditor, in support of the appeal, referred to *Lomax* v. *Buxton* (1); *Hopkinson* v. *Lusk* (2); *Woodhouse* v. *Murray* (3).

[*Gibson* v. *East India Company* (4) and *Innes* v. *East India Company* (5) were referred to during the argument as shewing that a pension of this kind was not available for creditors.]

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Respondent, were not called upon.

SIR G. MELLISH, L.J.:—

The question we have to decide is, whether this bill of sale was within the rule that an assignment of substantially the whole of a debtor's property, to secure an antecedent debt, is an act of bankruptcy. The Chief Judge has decided that it was an assignment of substantially the whole of the debtor's property—a conclusion to which he came, as a matter of fact, after hearing the principal witness examined and cross-examined. It is now contended that there was a substantial amount of property not included. First, a lease, which is said to have been worth £150; but it is probable that when all the effects had been sold off, the lease would not sell for anything. Secondly, there is a property in *India*, but the debtor himself speaks with uncertainty as to whether he has it or not, and there is no evidence as to its value. Thirdly, there is the pension of 10*s.* 6*d.* a day; but this is a property which does not pass to the trustee in bankruptcy, and could not be taken in execution by a creditor. We think, therefore, that this cannot constitute a substantial exception. The result is that our opinion agrees with that of the Chief Judge, and that the appeal must be dismissed with costs.

Solicitors: Messrs. *Clark, Woodcock, & Ryland*; Mr. *J. Elliott Fox*.

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(1) Law Rep. 6 C. P. 107.
(2) 34 Beav. 215. 10 Jur N.S 288
(3) Law Rep. 2 Q. B. 634; 4 Q. B. 27.
(4) 5 Bing. (N.S.) 262.
(5) 17 C. B. 351. 2 Jur N.S. 184.

BRUFF *v.* COBBOLD.

[1866 B. 148.]

L. JJ.
1872
Jan. 26.

Practice—Vacation of Inrolment—Rehearing—Application by a Person not a Party to the Suit.

A bill was filed by a former officer of a railway company to obtain the distribution of a sum of money which had been set apart for compensation of the officers of the company on its amalgamation with another company. By the decree the Court declared the Plaintiff entitled to a share in the fund, and directed an inquiry as to what other persons were entitled to share, and in what proportions. None of the other officers of the company were served with notice of the decree, but advertisements were issued, and the decree was inrolled. *A.* came in under the decree and claimed a share in the fund, and also desired to dispute the right of the Plaintiff to any share at all:—

Held, that *A.* was a *quasi* party to the suit, and was entitled to have the cause reheard for the purpose of varying the decree; and that the inrolment ought to be vacated in order to enable him to present a Petition of rehearing.

THIS was an application by Mr. *Edmund Ayres* to vacate the inrolment of the decree made by Vice-Chancellor *Stuart* in this suit, under the following circumstances:—

The bill was filed by Mr. *P. S. Bruff* against the *Great Eastern Railway Company* and three gentlemen who were called the Liquidation Committee, and stated that previously to the year 1862 the Plaintiff was employed by the *Eastern Union Railway Company* as their engineer; that in that year the *Eastern Union* and certain other railway companies were amalgamated with the *Great Eastern Railway Company*, which was incorporated under the *Great Eastern Railway Act*, 1862; that on the occasion of such amalgamation a sum of £5000 was set aside as a debt due to the *Eastern Union Railway Company*, to be applied as compensation to their officers; and that a committee of three directors of the *Eastern Union Railway Company*, called the Liquidation Committee, was appointed to consider and decide on the claims of such officers. The bill prayed (among other things) that the persons entitled to participate in the said sum of £5000 might be ascertained, and that the said sum might be raised and administered by the Court. The bill made other claims against the company which are not necessary to be mentioned.

S. C. on further consn W N (1874) 103 V C H

S C on petn for rehearing W N (1874) 63. V C W.

By the decree, dated the 24th of January, 1871, it was ordered that the *Great Eastern Railway Company* should, on or before the 8th of May, 1871, bring the sum of £5000 into Court; and it was declared that the Plaintiff, as an officer of the said company, was entitled to share in that sum; and it was ordered that an inquiry should be made who were entitled to share with the Plaintiff in the said sum, and in what shares and proportions; and that the *Great Eastern Railway Company* should pay the costs of the suit, with liberty to any of the parties to apply. But no further consideration as to the sum of £5000 was reserved.

Mr. *Edmund Ayres*, the present applicant, was the secretary of the *Eastern Union Railway Company* previously to its amalgamation, and in that capacity claimed a share of the fund. No notice of the decree was served on him, or on the other claimants who were not parties to the suit.

Advertisements were issued calling upon claimants to come in under the decree, and the applicant accordingly carried in a claim, and on the 22nd of May 1861, appeared in support of it; on which occasion he wished to dispute the Plaintiff's right to participate at all in the fund, but was debarred from that contention by the form of the decree.

Mr. *Ayres* accordingly presented a Petition, praying that the Plaintiff might be ordered to serve the Petitioner and the other claimants with notice of the decree, and that in the meantime all proceedings under the decree, so far as related to the £5000, might be stayed; and that the Petitioner might be at liberty to present a Petition praying that the cause might be reheard, so far as it related to the £5000, and that the decree might be varied by expunging the declaration as to the Plaintiff's right to participate in the fund.

Before the Petition came on to be heard, Mr. *Ayres* discovered that the decree had been inrolled on the 11th of March, 1871, and he accordingly now moved to have the inrolment vacated.

Mr. *Greene*, Q.C., and Mr. *J. L. Bird*, in support of the motion:—

Although the applicant is not a party to the suit, he is interested in the fund, and is entitled to be heard on the merits. In a creditor's suit it has been held, that a creditor who was not a party

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can obtain a rehearing: *Giffard* v. *Hort* (1). The suit is really one on behalf of all the *cestuis que trust* of the fund, and the applicant and all other claimants ought to have been served with notice of the decree, under the 15 & 16 Vict. c. 86, s. 42, rule 4, in which case they would have been able to obtain a rehearing: *Ellison* v. *Thomas* (2). Until this had been done the Plaintiff had no right to inrol the decree. It was, in fact, inrolled immediately after the advertisements were issued, before any of the claimants had made their claims. The inrolment was, therefore, irregular, and the Court will not allow it to stand in the way of the applicant obtaining a rehearing: *Jopp* v. *Wood* (3); *Trevillian* v. *Knight* (4).

Mr. *Smart*, for the *Great Eastern Railway Company*, submitted to any order that the Court might make.

Mr. *Karslake*, Q.C., and Mr. *Locock Webb*, for the Plaintiff:—

No reason is shewn for vacating the inrolment on the ground of surprise, or bad faith, and unless such cause is shewn, the Court will not vacate it: *Wildman* v. *Lade* (5). But if it is vacated, the applicant will have no *locus standi* to obtain a rehearing. He was not a party to the suit, but only came in as a creditor under the decree. By so doing he acquiesced in the decree, and he also filed affidavits in support of his claim before the Chief Clerk, and he cannot now object to the decree. The 4th rule of the 42nd section of the 15 & 16 Vict. c. 86, does not apply to such a case as this: *Knight* v. *Pocock* (6). The Plaintiff was not, therefore, bound to serve the other claimants with notice of the decree.

Sir W. M. James, L.J.:—

Now that the facts of the case and the position of the parties have been fully placed before us, I think it is clear that the application is right, both in substance and in form. Substantial justice is in favour of it, and there is nothing in the rule of the Court to prevent its succeeding. The decree was in respect of a sum of £5000, which the Court had taken upon itself to hold, at the instiga-

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(1) 1 Sch. & Lef. 386, 409.

(2) 1 D. J. & S. 18.

(3) 33 Beav. 372.

(4) Law Rep. 1 H. L. 30.

(5) 4 De G. & J. 401.

(6) 24 Beav. 436. 4 Jur. N.S. 197.

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tion of a person who claimed to participate in the fund. The Court has also undertaken to ascertain who are the persons entitled, and in what shares, and to distribute the fund among them. The present applicant is not, technically, a party to the suit, but he is a *quasi* party, in a sense in which a creditor is a party to a suit for the administration of an estate, or a *cestui que trust* to a suit for the administration of the trust fund. According to the authorities, it is open to a person in that position to apply for a rehearing. The applicant says, "I took in a claim, and if nobody else could establish a claim, I claimed the whole fund. I considered it questionable whether the Plaintiff was entitled to participate at all, and I was minded to contest his right; but I found that, behind my back, and quite unnecessarily, a declaration had been inserted in the decree that the Plaintiff was entitled to share in the fund. I am hampered by this declaration, made as it was in the absence of all persons interested in disputing the Plaintiff's claim. I endeavoured to get rid of this declaration by presenting a Petition of appeal, and I then found myself again hampered by this fresh difficulty, that the Plaintiff had got the decree inrolled." In my opinion, that declaration ought not to have been made, and I think there is great force in the argument that, according to the practice of the Court, the other *cestuis que trust* ought to have been served with notice of the decree, and they would then have had a month, within which they might have obtained a rehearing, and within which the decree ought not to have been inrolled.

Under these circumstances, I am of opinion that this inrolment cannot be relied upon, in answer to the Petition of a person who was not a party to the suit, and has never had an opportunity of impeaching the decree. The inrolment must therefore be vacated, and the costs of all parties will be reserved, to be dealt with by the Vice-Chancellor on the rehearing.

Sir G. Mellish, L.J., concurred.

Solicitor for Mr. *Ayres*: Mr. *G. Walker*.

Solicitors for the Plaintiff: Messrs. *Benham & Tindell*.

Solicitor for the *Great Eastern Railway Company*: Mr. *W. H. Shaw*.

In re NATIONAL ASSURANCE AND INVESTMENT ASSOCIATION.

L. JJ.
1872
Jan. 3.

In re CROSS.

Practice—Appeal for Small Amount—Solicitor—Lien on Property recovered—23 & 24 Vict. c. 127, s. 28—Winding-up.

A solicitor, who had successfully prosecuted a claim on behalf of a creditor, under the winding-up of a company, applied to the Court for a lien on the dividends payable to his client to the amount of his costs, which amounted to £1 15*s.* The application having been refused, the solicitor appealed to the Lords Justices.

The Lords Justices refused to entertain an appeal for so trifling an amount; although it was stated that it was a representative case, which would govern many others.

THIS was an appeal from a decision of the Master of the Rolls.

The Appellant, Mr. *Charles Henry Edmands,* was employed as solicitor in supporting the claim of Mr. *Philip Cross,* in the winding-up of the *National Assurance and Investment Association,* for a sum of £1000, as a creditor of the company.

The claim was admitted; and the Chief Clerk of the Master of the Rolls assessed the costs of the proofs allowed at the sum of £1 15*s.* on all claims which exceeded £10, and £1 10*s.* on all claims which did not exceed that sum; the costs in each case to be added to the debt. Mr. *Edmands* acted for a number of other creditors, who succeeded in establishing their claims against the company. Two dividends had been paid to the creditors, but Mr. *Edmands* had not received the amount of his costs. A third dividend having been declared, in respect of which £5 4*s.* 2*d.* was payable to Mr. *Cross,* Mr. *Edmands* applied by motion before the Master of the Rolls, asking that it might be declared that he had a lien for the sum of £1 15*s.* upon the dividends then payable, or to become payable, to Mr. *Cross,* and that the official manager of the company might be ordered to pay that amount to him. The Master of the Rolls refused the motion with costs.

Mr. *Edmands* appealed from the decision.

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Mr. *Fry*, Q.C., and Mr. *Caldecott*, for the Appellant, contended that the Appellant was entitled to a lien upon the dividends under the 23 & 24 Vict. c. 127, s. 28, and also, independently of that Act, as the fund was in the hands of the Court.

SIR W. M. JAMES, L.J.:—The matter is of a very trifling nature. Is not the County Court the proper tribunal to which the Appellant should apply? The rule of the Court of Chancery is that a suit will not be entertained for less than £10.

Mr. *Fry* and Mr. *Caldecott* argued that this was the most inexpensive method by which the Appellant could enforce his claim. It was also a representative case, and would govern several hundred of similar cases. If the smallness of claims were an obstacle to a solicitor enforcing his lien, it would be an encouragement to solicitors to make out large bills of costs.

Mr. *Roxburgh*, Q.C., and Mr. *W. D. Gardiner*, for the official manager, were not called on.

SIR W. M. JAMES, L.J.:—

Unless I am ordered to do so by the House of Lords, or some other competent Court, I will not allow an appeal for the sum of £1 15*s*. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Edmands & Mayhew*; Messrs. *Travers Smith & De Gex*.

In re BIGNOLD'S SETTLEMENT TRUSTS.

L. JJ.
1872
Feb. 12.

Appointment of New Trustees—"Incapable to act"—Residence Abroad—Trustee Act, 1850, *s.* 32.

22 ChD 6

The Court has power, under the 32nd section of the *Trustee Act*, 1850, to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent.

Semble, a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad.

Re Blanchard (1) explained.

THIS was a Petition brought before the Lords Justices in the first instance at the request of Vice-Chancellor *Wickens*, in whose Court the Petition had been set down.

The Petition was entituled in the above-mentioned matter, and also in the matter of the will of *H. D. Hemsworth*, and of the *Trustee Acts*, 1850 and 1852. It stated that, under the marriage settlement of Mr. and Mrs. *Bignold*, and the will and codicil of the lady's father, certain trust funds had become vested in, and blended in the hands of, certain trustees, one of whom, on the 2nd of July, 1868, left *England* for *Tahiti*, with the intention, which he had ever since adhered to, of residing there permanently as a merchant. Under these circumstances the donees of the power of appointing new trustees under the settlement and will respectively had executed deeds appointing a new trustee of them respectively, in place of the trustee out of the jurisdiction. And the object of the Petition was to obtain vesting orders of the property, dispensing with service on the trustee out of the jurisdiction.

The Petition was presented by all the parties interested under the settlement and will, by the two trustees within the jurisdiction, and the new trustee, and there were no Respondents.

No difficulty arose with reference to the exercise of the power contained in the settlement; but the power contained in the will only extended to the cases of trustees "dying, disclaiming, or desiring to be discharged, or refusing, declining, or becoming in-

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(1) 3 D. F. & J. 131. 7 Jur N.S. 505.

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capable to act." The question therefore was, whether the fact of the trustee's permanent residence out of the jurisdiction in the present case rendered him "incapable to act" within the meaning of the power.

Mr. *Horton Smith*, for the Petitioners, submitted that the appointment was valid, and that *Mennard* v. *Welford* (1) and *Sugden* on Powers (2) should be followed, rather than *Withington* v. *Withington* (3) and *Re Watts's Settlement* (4).

THE LORDS JUSTICES inclined to the opinion that the incapacity to act meant a personal incapacity, and that each case must depend on its own circumstances; but, without expressly deciding the point, suggested that the difficulty might be met by the Court appointing a trustee under the 32nd section of the *Trustee Act*, 1850.

Mr. *Horton Smith* said that a new trustee had been appointed in place of a person out of the jurisdiction in *Re Stewart* (5), and *Re Harrison's Trusts* (6). But a doubt had arisen from the decision in *Re Blanchard* (7), where it was held that the Court had no power to remove a trustee against his wish. In the present case the trustee had not consented to be removed, nor had he been served.

THE LORDS JUSTICES were of opinion that *Re Blanchard* did not militate against the previous authorities; and that the Court had authority to make the appointment. They therefore ordered the Petition to stand over with liberty to amend, so as to ask for the appointment of the new trustee, and the consequential vesting order. The Petition was to be then mentioned again, and the usual affidavit of fitness of the new trustee to be produced.

Solicitor: Mr. *D. Keane*.

(1) 1 Sm. & Giff. 426. 17 Jur 815.
(2) Page 888, note (a), 8th Ed.
(3) 16 Sim. 104.
(4) 9 Hare, 106.
(5) 8 W. R. 297.
(6) 22 L. J. (Ch.) 69.
(7) 3 D. F. & J. 131. 7 Jur NS 505.

CITY OF MOSCOW GAS COMPANY *v.* INTERNATIONAL FINANCIAL SOCIETY.

L. J. J.
1872
Feb. 13.

[1871 M. 198.]

Practice—Security for Costs—Cross Suit—Limited Company—Companies Act, 1862, *s.* 69.

The *I.* society filed a bill against the *M.* company to foreclose a mortgage comprising nearly the whole of the effects of the *M.* company. At this time the *M.* company was in process of being wound up under the supervision of the Court. By leave of the Court in the winding-up, a bill was filed in the name of the *M.* company against the *I.* society, praying that it might be declared that the mortgage deed was not binding on the *M.* company, or its bondholders or shareholders: but that, if the Court held it to be a good security, certain renewed bills might be excluded from its operation, and that it might be declared a security only for bills of exchange accepted by the *I.* society; and that, in estimating the debt covered by it, no bills accepted by persons or firms other than the *I.* society might be included; and that an account might be taken on this footing of what was due; and that the *M.* company might be allowed to redeem on payment of what should be so found due:—

Held, by the Master of the Rolls, that whether this was a purely cross bill or not, the Plaintiffs in it must give security for costs; and, *semble*, it was not a purely cross bill:—

Held, on appeal, that the bill was not a mere cross bill; that the case was governed by *Washoe Mining Company* v. *Ferguson* (1); and that security for costs must be given.

Semble, that even had it been a pure cross bill, security for costs must have been given, as it was filed in the name of a company which was being wound up.

THIS was an appeal by the Plaintiffs from an order of the Master of the Rolls directing them to give security for costs.

The *City of Moscow Gas Company, Limited,* was an English company with limited liability, established for lighting the city of *Moscow* with gas, under a concession from the municipality of *Moscow*.

On the 16th of February, 1867, a complicated deed was executed, by which the *International Financial Society, Limited*, undertook to cause an accommodation credit to be opened for the company to the extent of £260,000, and for that purpose to furnish the company with the names of persons, firms, and companies on whom the company might draw bills. The company undertook to pay such bills when due, and indemnify the society and the acceptors against them; and if the society paid any of them, then to repay the society. For these acceptances a certain rate of commission was to be charged. The company, for securing the performance of their part of the agreement, assigned to the society by way of mortgage the caution money deposited with the municipality, a stock of coals in *Russia*, a stock of gasfittings and other like articles at *Moscow*, the moneys receivable in respect of calls already made, and certain other effects, and also the concession and the gasworks and plant at *Moscow*.

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(1) Law Rep. 2 Eq. 371.

The affairs of the company became embarrassed; and, on the 20th of November, 1868, the society gave notice that they should take possession of the mortgaged property, which they accordingly did, and carried on the undertaking. On the 10th of March, 1869, a resolution was passed for the voluntary winding-up of the company; and on the 13th an order was made for continuing this winding-up under supervision.

On the 19th of April, 1871, the society filed their bill against the company, praying for an account of what was due to the Plaintiffs for principal, interest, commission, and discount in respect of their advances, and for expenditure properly made in carrying on the works, and for foreclosure in default of payment.

In October, 1871, pursuant to leave of the Court given in the winding-up, the bill in this cause was filed in the name of the company against the society and their secretary, who was made a Defendant for the purpose of discovery. This bill prayed that it might be declared that the deed of the 16th of February, 1867, was not a due execution of the power of borrowing contained in the company's articles, and was not binding on the company or its bondholders or shareholders; that if the Court held the power of borrowing to be well exercised, then it might be declared to what extent the property and effects of the company were well mortgaged to the society; that if the Court should hold the deed a good security to any extent, it might be declared not to extend to any of the last-renewed bills outstanding at the date of the winding-up order; that on the like assumption that the deed was a valid

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security, it might be declared that it was, at the date of the winding-up order, a security for £63,200 only, being the amount of the last-renewed bills of exchange accepted by the society; and that, in estimating the debt due to the society, no bills accepted by persons or firms other than the society, and in respect of which the society had paid nothing, ought to be treated as covered by the security; that, on the like assumption, an account might be taken of what was due from the company to the society as mortgagees in possession, and that the company might be at liberty to redeem on payment of what should be found due; that the society might be restrained from exercising the power of sale in the deed of the 16th of February, 1867; and that, if necessary or expedient, a receiver might be appointed.

The society applied that the company might be ordered to give security for costs. The Master of the Rolls made the order, saying, "I am of opinion that a wide discretion is given to the Court by the *Companies Act*, 1862, s. 69, which I have always acted upon by compelling a company in liquidation to give security for costs whenever it files a bill. I think that this discretionary power applies, and ought to be exercised, even if the bill should be strictly a cross bill, which I think this is not. Whether it be so or not, I am of opinion that the company must give security for costs; and, as I have held in former cases, not merely to the extent of £100, as under the old system, but substantial security."(2) The security was afterwards fixed in Chambers at £800.

Mr. *Fry*, Q.C., and Mr. *Cookson*, for the Appellants:—

The Plaintiff in a cross suit is never ordered to give security for costs, the principle being, not that the Defendant by suing the Plaintiff originally has admitted the jurisdiction, but that a person who, though nominally a Plaintiff, is really only a Defendant, is to be allowed to defend himself freely. This applies to a company as well as to an individual: *Accidental and Marine Insurance Corporation* v. *Mercati* (1).

[The LORD JUSTICE JAMES:—Is this a pure cross bill? It seems to be one on which you might proceed and obtain substan-

(1) Law Rep. 3 Eq. 200.

(2) See W N (1871) 247. 20 W R 196.

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tial relief, though the Plaintiff in the original suit dismissed his bill. It is not, therefore, merely a defence.]

That, we submit, is not the test, as appears from *Accidental and Marine Insurance Corporation* v. *Mercati* (1); *Macgregor* v. *Shaw* (2); *Watteeu* v. *Billam* (3); *Wilkinson* v. *Lewis* (4); in which security for costs was not ordered, though the cross bill sought independent substantial relief.

Mr. *Charles Hall*, for the Defendants:—

This is not a *bonâ fide* application on behalf of the company, the suit being by bondholders in its name. Whatever the rule may be in ordinary cases, it ought not to apply where the nominal Plaintiff in the cross suit is insolvent and is not the real Plaintiff. There appears to be no decision on the point in equity, but at law the practice is quite settled: *Ball* v. *Ross* (5); *Chitty's Archbold's* Practice (6); *Mais* v. *M'Namara* (7). In the present case, moreover, the bill is not so strictly a cross bill as to bring the case within the rule that a Plaintiff in a cross bill does not give security for costs: *Washoe Mining Company* v. *Ferguson* (8).

Mr. *Cookson*, in reply:—

The case of the *United Ports and General Assurance Company* v. *Hill* (9) is in our favour. In *Washoe Mining Company* v. *Ferguson* the cross bill was not a bill to impeach the contract, but to enforce a different agreement. Here the substance of the cross bill is to set aside the security, which is mere matter of defence.

Sir W. M. James, L.J.:—

I am of opinion that this case is entirely governed by the *Washoe Mining Company* v. *Ferguson.* The bill is not a mere cross bill, the case being exactly like that of a bill for specific performance being filed, and then a bill being filed by the Defendant for specific performance of the same contract upon a different construction

(1) Law Rep. 3 Eq. 200.
(2) 2 De G. & Sm. 360.
(3) 3 Ibid. 516.
(4) 3 Giff. 394.
(5) 1 Man. & G. 445.
(6) 12th Ed. 1417.
(7) 5 Ex. 267.
(8) Law Rep. 2 Eq. 371.
(9) Law Rep. 5 Q. B. 395.

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of it. In the present case the bill does not merely impeach the security, but seeks to redeem on a different footing from that on which the Plaintiffs in the foreclosure suit ask to foreclose; it is, therefore, a bill seeking to enforce an agreement on different terms from those contended for by the original bill, and is not merely a defence to the original suit. It is no answer to this to say, that the first paragraph of the prayer is the substantial one. It may be that the other paragraphs of the prayer are the only ones on which there is the slightest prospect of obtaining relief; and if the Appellants' argument on this point were to be allowed, a Defendant might avoid giving security for the costs of a so-called cross suit by commencing his prayer with a clause under which he had no idea of ever obtaining anything. On this ground, therefore, the appeal motion must be refused. But I am disposed to agree with the Master of the Rolls that, whenever a bill is filed in the name of a company which is being wound up, security for costs must be given, whether the bill be a purely cross bill or not.

Solicitors: Mr. *Clements;* Messrs. *Harrison, Beal, & Harrisons.*

In re WYNNE.

L. JJ.
1872
Feb. 17.

Lunacy—Practice—Jurisdiction—Agreement by Committee to grant a Lease.

A gentleman entered into an arrangement by letter with the land agent who acted for the committee of a lunatic's estate, to take a lease of part of the estate for a term of three years. No formal agreement was entered into, nor was the sanction of the Master in Lunacy applied for, but the tenant was let into possession, and expended a considerable sum in repairs and improvements. After he had been nearly eighteen months in possession, the committee gave him six months' notice to quit, upon which he applied by Petition to have the terms of his arrangement with the agent carried into effect:—

Held, that the Court had jurisdiction to make an order giving effect to that arrangement; and order accordingly.

JOHN WYNNE having been found to be a person of unsound mind, his wife, *Virginia Wynne*, was, in July, 1858, appointed committee of his person and estate.

Part of the lunatic's property consisted of an estate comprising a mansion-house and farm, which, in the beginning of 1870, were occupied by Mr. *Blezard. William Jones* acted as agent for the committee, and all communications relating to the property were made to him. In 1870 Mr. *Blezard,* being desirous of leaving the place, arranged to hand it over to the Petitioner, Mr. *Cope,* if Mr. *Cope* would buy his furniture and could get himself accepted as tenant. Mr. *Cope,* who required the property as a summer residence and for sporting, had an interview in March, 1870, with Mr. *Jones,* who, as Mr. *Cope* deposed, represented himself as an agent entitled to let the property, and in the same month letters passed between him and Mr. *Cope,* which, assuming Mr. *Jones*' capacity to contract, constituted an agreement for a lease for three years from the 25th of March, 1870. No further agreement was signed, nor was the sanction of the Master in Lunacy applied for; but on the last-named day Mr. *Cope* entered into possession with the knowledge of the committee. Mr. *Cope* paid for the furniture and tenant's fixtures, and expended upwards of £400 in repairs and permanent improvements.

On the 14th of September, 1871, the committee served Mr. *Cope* with notice to quit on Lady Day, 1872. The rent was not in arrear, nor was it alleged to be too low, nor was any ground suggested for objecting to Mr. *Cope* as a tenant.

Mr. *Cope* thereupon presented his Petition in lunacy, and in the matter of the *Lunacy Regulation Act,* 1853, praying that *Virginia Wynne,* as the committee of the estate, might be directed to grant the Petitioner a lease in conformity with the terms agreed upon between him and Mr. *Jones,* as mentioned above, and might be restrained from ejecting the Petitioner.

Mr. *Little,* Q.C., and Mr. *Jackson,* for the Petitioner.

Mr. *Southgate,* Q.C., and Mr. *Jones-Bateman,* for the committee, raised the question of jurisdiction, the Petitioner being a person not interested in the lunatic's estate, but did not very strongly press the objection.

THEIR LORDSHIPS thought that they had jurisdiction to make the order, and that it would be right to make it in the circumstances of the present case, for that the Court would do on behalf of a lunatic what a just and reasonable owner would do. They accordingly directed the committee to allow the Petitioner to remain in possession on the present terms till Lady Day, 1873.

Solicitors: Mr. *J. H. Lydall;* Messrs. *Merediths, Roberts, & Mills.*

L. C.
1872
Jan. 15, 16, 17.

SINNETT *v.* HERBERT.

[1868 S. 169.

Will—Mortmain—Gift to erect or endow a Church—Endowment of Future Church—Impracticable Object—Cy-près—43 Geo. 3, c. 108.

LR 8 Ch 206
208, 210, -3.
18 Eq 116.
7 Ch D. 206
[illegible]
11 Ch D. 949
952-3, 4-5,

A gift for the endowment of a future church is not void under the *Mortmain Act.*

A testatrix gave the residue of her personal estate to trustees upon trust to be by them applied in aid of erecting or endowing an additional church at *A.* :—

Held (reversing the decision of *Bacon*, V.C.), that the gift was not intended to be confined to a church to be erected or commenced before the death of the testatrix, but was applicable to any future church.

An inquiry was directed whether the residuary personal estate could be employed in aid of erecting or endowing an additional church at *A.*

Whether the Court will hold a fund for an indefinite time which has been given for a charitable object, where there is no reasonable prospect of carrying it into execution—*Quære.*

Whether the doctrine of *cy-près* applies where there is a gift to a particular object which there is no reasonable prospect of carrying into execution—*Quære.*

Where pure and impure personalty is given to trustees to erect or endow a church, they are entitled, under the 43 Geo. 3, c. 108, to £500 out of the impure personalty, in addition to the whole of the pure personalty.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1).

Mary Moine, by her will, dated the 7th of April, 1865, after giving certain annuities and disposing of her real estates, bequeathed to *Frederick Rowland Roberts* and *John Sinnett,* whom she appointed her executors, £3000, "to be by them applied in aid of an endowment for a Welsh church now in course of erection at *Aberystwith.* And as for and concerning the residue of my personal estates and effects, subject to the payment of my debts, funeral and testamentary expenses, and the legacies hereinbefore by me bequeathed, I bequeath the same to the said *F. R. Roberts* and *J. Sinnett* upon trust to be by them applied in aid of erecting or of endowing an additional church at *Aberystwith* aforesaid."

The testatrix died on the 10th of December, 1866.

A suit having been instituted for the administration of the testatrix's estate, an inquiry was directed by the decree whether there was any church answering the description in the will of "an additional church at *Aberystwith*" being erected or being about to be erected at the time of the death of the testatrix.

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(1) Law Rep. 12 Eq. 201.

By his certificate, the Chief Clerk found that there was not any church answering the description in the will of an additional church at *Aberystwith* being erected or being about to be erected at the time of the testatrix's death.

It appeared from the evidence of the Vicar of *Aberystwith*, that at the date of the will there was at *Aberystwith* the Church of *St. Michael*, which was constituted by Order in Council in 1861 the district church, and that there was also a church then in course of erection as a chapel of ease to *St. Michael's*, and known as the "Welsh Church," from its being intended to hold the services therein in Welsh. This church was opened for public worship in August, 1867. Beyond these two churches, there was no other church at *Aberystwith*, and there was not any church being erected or being about to be erected there, although, as the Vicar stated, he had often talked with the testatrix respecting the endowment of the Welsh Church, and the necessity during the summer season of additional church accommodation, either by enlarging *St. Michael's*, or by building an additional church, or by having an additional service for visitors at the Welsh Church.

The Vice-Chancellor held that the gift of the residue was not intended to provide an endowment, except in the event of a church being erected or in course of erection at the testatrix's death, and that the gift, therefore, failed.

From this decision the Attorney-General appealed.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Hemming*, for the Attorney-General:—

The construction put by the Vice-Chancellor upon the gift is erroneous. The testatrix clearly had in her mind the endowment of a future church. A gift to build or endow a church is good in the alternative: *Edwards* v. *Hall* (1); although it was at one time doubted whether a gift to endow a future church was not void, as

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(1) 11 Hare, 1, 10; 6 D. M. & G. 74.

17 Jur 593 & 2 Jur N.S. 1169

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tending to bring fresh land into mortmain. But that doubt is now set at rest: *Philpott* v. *St. George's Hospital* (1). The objection on the ground of remoteness does not apply to a charity; and if no object can be found within a reasonable time, the gift will be applied *cy-près.*

Mr. *Bristowe,* Q.C., and Mr. *Fellows,* for some of the next of kin of the testatrix; and Mr. *Kay,* Q.C., and Mr. *Speed,* for others of the next of kin:—

The construction put upon the gift by the Vice-Chancellor is correct. The word "endow" means to give a benefit to some existing thing: *Edwards* v. *Hall* (2). And if there was no church existing or in course of erection at the testatrix's death, the gift must fail. If the gift is construed as applicable to a future church, it fails for remoteness. The Court will not hold a fund for an indefinite time. The doctrine of *cy-près* does not apply to cases where there is a gift for a definite object specified by the testator, and no general dedication of the gift to charity. If the definite object fails, the gift fails also: *Cherry* v. *Mott* (3); *Corbyn* v. *French* (4); *Attorney-General* v. *Bishop of Oxford* (5); *Clark* v. *Taylor* (6).

Mr. *Amphlett,* Q.C., and Mr. *Speed,* for the Plaintiffs.

The *Solicitor-General,* in reply, cited, on the question of remoteness, *Vaughan* v. *Farrer* (7); *Attorney-General* v. *Bowles* (8); *Gastril* v. *Baker* (9); *White* v. *White* (10); *Bernal* v. *Bernal* (11). He also claimed, in addition to the pure personalty, the impure personalty to the amount of £500, under 43 Geo. 3, c. 108, and on this point referred to *Girdlestone* v. *Creed* (12).

Mr. *Bristowe,* in reply, as to the effect of 43 Geo. 3, c. 108, referred to *Incorporated Church Building Society* v. *Coles* (13).

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(1) 6 H. L. C. 338. 3 Jur NS 1269
(2) 11 Hare, 1; 6 D. M. & G. 74.
(3) 1 My. & Cr. 123.
(4) 4 Ves. 418.
(5) 1 Bro. C. C. by Eden, 444, n. q.; cited 4 Ves. 431.
(6) 1 Drew. 642.
(7) 2 Ves. Sen. 182.
(8) Ibid. 547.
(9) Cited Ibid. 185.
(10) 7 Ves. 423.
(11) 3 My. & Cr. 559.
(12) 10 Hare, 480.
(13) 5 D. M. & G. 324.

(2) S C 17 Jur 593; 1 Jur NS 1187

Jan 16. LORD HATHERLEY, L.C.:—

Upon the construction of the will I have no hesitation in saying that I can hardly follow the reasoning by which the learned Vice-Chancellor came to the conclusion that the testatrix, by the words of her will, referred to a church which should be built during her life, so that at the time of her death there should be something in existence which might be endowed with the residue she disposed of. The course she took was this: She gave a definite gift towards the building of a particular church, which was in course of erection during her lifetime, and having done that she gave the whole of her residuary personal estate towards the erection or endowment of an additional church at *Aberystwith*. It therefore appears clear to me that her mind was contemplating the future, and that she was thinking of no church in particular. If there had been three or four churches built when she died, the question for the trustees would have been to which they would prefer to give the benefit of the endowment. They are not tied down to any particular church, but only to a church at *Aberystwith*. That being so, there appears to have been a direction by the original decree for an inquiry whether any church was being built or about to be built. That is confined to the time of her death, but I think the inquiry ought to be extended to any proceedings which are now about to be taken for building a church. Supposing an answer comes back in the negative, then arises the question upon which there is some conflict of authorities, for the modern decisions have not been so favourable to charities as some of the older authorities were. The question I have to consider is, reading the gift as I do as a bequest "for aiding the erection or endowment of any church which at any time hereafter may be built at *Aberystwith*," how far that bequest can be supported? First: Can such a trust be executed *cy-près* if no opportunity appears within any reasonable time for applying the fund as directed by the testatrix? Suppose an extreme case. If, for instance, a person should leave money in order that when a Chinese ambassador should be appointed, a chapel might be provided for his household, the executors would have to wait till a Chinese ambassador was appointed before the money could have any lawful application. The question is, what is to be done in such cases? There are many authorities

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upon the point; but the early authorities are quite clear, that if a particular purpose is frustrated, even if it be unlawful, then you may apply it *cy-près*. Such was *Attorney-General* v. *Baxter* (1), in which the gift was held to be void in consequence of its being supposed to be against the law to carry it into effect. The decree was afterwards reversed on the ground that the gift was not void; but the original decree was, that, as the bequest was against the law, it should be applied to some other charitable purpose. That does not seem to be now recognised as law.

That question was a good deal discussed in the case of *Corbyn* v. *French* (2), in which *Attorney-General* v. *Bishop of Oxford* (3) was referred to. In the latter case the trust was to establish a church in a certain place, where no permission for the purpose could be obtained from the Bishop of *Oxford*. Ultimately the Court seems to have sanctioned what appears to have been in the nature of a compromise, and an arrangement was come to by which the next of kin consented to £3000 being spent for this purpose, and the remainder of the residue was paid over to them. Then followed the case of *Attorney-General* v. *Andrew* (4), before Lord *Loughborough*, which is more analagous, I think, to the case before us. There was a gift by Dr. *Andrew* for the purpose of founding scholarships at Trinity College, *Cambridge*, for which he had an affection. The college refused to accept the trusts, and therefore an inquiry was directed whether any scheme could be devised for founding scholarships at Trinity College within the terms of the will, and that decree was confirmed by the House of Lords. It is, therefore, a case of considerable authority. I do not know what ultimately became of that case. But if the college refused to accept the gift on the terms offered, would it have to be applied *cy-près* to some other or totally different purpose, or to be held in suspense for a definite period?

The cases which have been cited by the Solicitor-General have been cases in which there were future operations to be performed, but the scheme might be one to be carried into effect at once—as in the case of a hospital, which might be built at once; so in the other case which I put during the argument—a gift in former times for the redemption of Barbary slaves. Although there might be none at a given time, such a gift would apply to all those who were in future subject to that calamity; and the Court would direct a scheme for that purpose. But suppose anybody were now to make a bequest in the possible contingency of the Arabs getting the better of the French Government and re-possessing *Algiers*, the question would arise whether a prospective bequest of that sort could be carried into effect by the Court; whether it would be a case for the application of the *cy-près* doctrine, or whether it would be considered as a matter altogether not feasible, and therefore on that account, and on that account only, null and void. That is one point upon which I should like to hear arguments by one counsel on each side. I do not think the case of *Bernal* v. *Bernal* (1) is exactly a case in point, because it might almost be taken for granted that every person in the world, if he has not already, is likely to have, ere long, poor relations.

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(1) 1 Vern. 248.
(2) 4 Ves. 416.
(3) 4 Ves. 431.
(4) 3 Ibid. 633.

There is another point also with respect to which I should like to hear further argument, namely, with respect to the application of the sum of £500 which may be taken out of the impure personalty under the 43 Geo. 3, c. 108.

Jan. 17. The case was accordingly re-argued on the points indicated by the Lord Chancellor.

The *Solicitor-General* (Mr. *Hemming* with him), for the Attorney-General:—

A gift to a charitable purpose, if lawful in itself, is good, although no object may be in existence at the time. This was expressly decided in *Attorney-General* v. *Bishop of Chester* (2), where the gift was for the purpose of establishing a bishop in His Majesty's dominions in *America*. In that case the money was directed to remain in Court till it should be seen whether any bishop would be appointed. *Attorney-General* v. *Bishop of Oxford* (3) is not inconsistent with this. For although the bishop refused to consent to the building of a church, the gift was not declared void; but an inquiry was directed how the residue could be best applied. The rule against remoteness is a technical common law rule which has never been held to apply to charitable gifts.

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(1) 3 My. & Cr. 559.

(2) 1 Bro. C. C. 444.

(3) 1 Bro. C. C. by Eden, 444, n. q.; cited 4 Ves. 431.

If the gift in the present case cannot be carried into effect within a reasonable time, it ought to be applied *cy-près*. The rule is well established, that where there is an intention to devote the gift to charity, and the particular object fails, the gift is to be applied *cy-près*. The rule is correctly expressed by Mr. *Jarman* (1), "If the donor declare his intention in favour of charity indefinitely, without any specification of objects, or in favour of defined objects which happen to fail from whatever cause—although in such cases the particular mode of operation contemplated by the testator is uncertain or impracticable—yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect." *Hayter* v. *Trego* (2) and *Loscombe* v. *Wintringham* (3) are instances where the gift was impracticable, and *Bennett* v. *Hayter* (4) where it was ambiguous. The only exception is where the gift is to an object forbidden by statute. The distinction between a particular and general gift to charity made by some text writers, and introduced into the later editions of *Jarman*, cannot be supported. It rests entirely upon some modern cases which, so far as they touch the point, are irreconcilable with the old authorities, and are not law. *Cherry* v. *Mott* (5) was the case of a conditional legacy, and the observations of the Master of the Rolls on the doctrine of *cy-près* were mere *dicta* not necessary for the decision. *Attorney-General* v. *Andrew* (6), *Mills* v. *Farmer* (7) *Moggridge* v. *Thackwell* (8), *Cary* v. *Abbot* (9), *De Costa* v. *De Pas* (10), *Attorney-General* v. *Boultbee* (11), *Incorporated Society* v. *Price* (12), *Marsh* v. *Attorney-General* (13), are in our favour. With respect to the cases which appear inconsistent, in *Clark* v. *Taylor* (14) and *Russell* v.

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(1) *Jarm.* on Wills, vol. i. 3rd Ed. p. 223.
(2) 5 Russ. 113.
(3) 13 Beav. 87.
(4) 2 Ibid. 81.
(5) 1 My. & Cr. 123.
(6) 3 Ves. 633.
(7) 1 Mer. 55.
(8) 7 Ves. 36.
(9) Ibid. 490.
(10) Amb. 228.
(11) 2 Ves. 380.
(12) 1 J. & Lat. 498.
(13) 2 J. & H. 61.
(14) 1 Drew. 642.

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Kellett (1), the objects were private, not public, charity. *Chapman* v. *Brown* (2) was dissented from by your Lordship in the late case of *Fisk* v. *Attorney-General* (3). In *Marsh* v. *Means* (4) there was no charitable purpose at all.

With respect to the statute 43 Geo. 3, c. 108, which permits £500 to be applied to building a church, the whole of that sum may be taken out of the impure personalty. There was no obligation on the trustees to adopt either alternative in the gift; they are at liberty to apply the whole of the pure personalty to the endowment of a church, and they can then apply the £500 under the statute in building: *Girdlestone* v. *Creed* (5).

Mr. *Kay*, Q.C. (Mr. *Speed* with him), for some of the next of kin, and

Mr. *Bristowe*, Q.C. (Mr. *Fellows* with him), for others of the next of kin:—

There being no object in existence, or likely to be in existence within a reasonable time, the gift fails absolutely. The Court will not keep the fund indefinitely, in expectation of an occasion for its application arising; and the only real question is, whether it can be applied *cy-près*. But the doctrine of *cy-près* has never been held to apply to cases where there is no general dedication of the fund to charity. The distinction between a particular gift to charity and a general gift is well established: *Cherry* v. *Mott* (6); *New* v. *Bonaker* (7); *Simon* v. *Barber* (8). In the case of *Attorney-General* v. *Bishop of Oxford* (9), a scheme was sanctioned with the consent of the residuary legatees; but that compromise could not have been made if the whole fund has been impressed with a charitable trust. It is therefore no authority for the application of the doctrine, unless there is such a general dedication to charity. The same distinction is recognised in *Clark* v. *Taylor* (10); *Bullock* v. *Bennett* (11); *Russell* v. *Kellett* (1; *Marsh* v. *Means* (4; *Russell* v. *Jackson* (12).

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(1) 3 Sm. & Giff. 264. 2 Jur NS 182
(2) 6 Ves. 404.
(3) Law Rep. 4 Eq. 521.
(4) 3 Jur. (N.S.) 790.
(5) 8 Hare, 208; 10 Hare, 480.
(6) 1 My. & Cr. 123.
(7) Law Rep. 4 Eq. 655.
(8) 5 Russ. 112.
(9) 1 Bro. C. C. by Eden, 444, n. q.; cited 4 Ves. 431.
(10) 1 Drew. 642.
(11) 7 D. M. & G. 283. 1 Jur NS 567
(12) 10 Hare, 204.

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With respect to the £500, under the 43 Geo. 3, c. 108, the object of that statute was to permit a limited disposition of a specific amount to building a church, not to save £500 out of a general gift which would be otherwise void: *In re Watmough's Trusts* (1); *Incorporated Church Building Society* v. *Coles* (2). At all events the £500 ought to be taken *pro ratâ* out of the pure and mixed personalty, and not exclusively out of the latter.

LORD HATHERLEY, L.C.:—

I entertain no doubt as to what ought to be done in the present case. Very able arguments on both sides have been addressed to me this morning with respect to the application of the doctrine of *cy-près*, but I do not think that there is any necessity for going into that question at present. As far as I can judge from what has been stated there is a possibility of a church being built at *Aberystwith*, and therefore I think it is extremely probable that we may never arrive at the application of that doctrine at all.

I think it is plain in the first place that upon the true construction of the will the bequest must be taken to be a bequest for the purpose of aiding in the erection of any additional church in *Aberystwith*. I differ so far from the Vice-Chancellor, who thought that the testatrix intended to confine her executors to the case of an actual church erected and requiring endowment, or a church in progress of erection at the time of her death.

As to the difficulty from the possible remoteness of the time when her intention can be carried into effect, I think the case of the *Attorney-General* v. *Bishop of Chester* (3) is a complete answer. In that case the very point which arises here was suggested. There was a sum of £1000 left for a good charitable purpose, namely, for the purpose of establishing a bishop in the king's dominions in *America*. There was no bishop in *America*. The sum, being only £1000, was not very likely in itself to be sufficient to establish a bishop. Nothing could be more remote, or less likely to happen within a reasonable period, than the appropriation of that fund to that particular object. But the Court did not direct any application of the fund according to the *cy-près* doctrine; it would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time with liberty to apply, because it was not known whether any bishop would be established. But that the Court would continue to retain it for ever, waiting until a bishop should be appointed, I think is a very doubtful proposition.

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(1) Law Rep. 8 Eq. 272.

(2) 5 D. M. & G. 324.

(3) 1 Bro. C. C. 444.

There have been numerous cases of gifts to charities where an inquiry has been directed, whether there is anything *in esse* to which the fund of the testator can be properly applied so as to carry out his wishes. One of the last of such cases was that cited by Mr. *Bristowe*, *Russell* v. *Jackson* (1), in which the testator wished a Socialist school to be established. The Court held the gift as to the impure personalty to be bad under the *Statute of Mortmain.* It then directed an inquiry what the principles of Socialism were, in order to see whether they contained anything really objectionable. A similar inquiry appears to have been directed in the case of *Thompson* v. *Thompson* (2), where the testator left a fund for the appointment of a professor to teach his opinions as contained in the testator's printed books, which nobody at that time had read. It being found on inquiry that there was nothing contrary to morality or religion in the opinions contained in those books, the trust was ordered by the Court to be carried out.

The course, therefore, that seems to me the correct one, upon the first part of the case, is to direct an inquiry at Chambers whether or not the funds which are effectually given to the trustees for the purpose of aiding in erecting or endowing a church at *Aberystwith,* or any and what part thereof, can be so laid out and employed.

Then, with regard to the question as to the £500, I entertain no doubt about it. The case stands thus: Supposing there was no question as to the application of the *Mortmain Act,* the testatrix having given the whole of her residuary estate for the purpose of aiding in erecting or endowing an additional church, the executors and trustees would be justified either in applying the whole in erecting a church, or the whole in endowing a church, or such part as they thought fit in erecting and such part as they thought fit in endowing.

(1) 10 Hare, 204.

(2) 1 Coll. 395.

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In that respect this case differs from *Girdlestone* v. *Creed* (1), where the bequest was to build "and" endow a church. If the gift went into a general fund the question would arise how much was to be devoted to building and how much to endowment; and but for the saving statute such a bequest for the building and endowing of churches would, upon several authorities, have been totally void, because the one object could not be separated from the other. But then comes the statute 43 Geo. 3, c. 108, which says that you can, to the extent of £500, bequeath money for the building of churches.

An argument has been put forward by Mr. *Kay* and Mr. *Bristowe* to shew that there is the same difficulty in this will as where there is a bequest to build and endow. They say that, when the £500 has been saved out of the fund, there is still nothing in the will to shew any intention of the testatrix as to what proportion of the residue is to be applied in building, and what part in endowment; and therefore the whole gift must fail. But I do not think that there is any force in that argument. The testatrix has said, "You may take as much of my personal estate as you like, whether mixed or pure personalty, and you may apply any portion of it either towards the building or towards the endowing as you see best." If there were no statute at all on the subject the will would authorize them to employ it in such a manner, and according to such proportions, as they thought fit. Then, the *Statute of Mortmain* being brought into the question, it is found that the one thing is utterly prohibited by it, and, therefore, the whole scheme would have failed; but the choice being given of devoting it to one of two purposes, the whole will be saved for the legitimate purpose. Then another statute having interposed, enacting that a testatrix may give £500 for building a church, and the testatrix having attempted to give the whole mixed fund, the Court of Chancery takes care to draw out the £500, and declares the rest of that gift void under the *Statute of Mortmain*. Thus the executors are placed in possession of two funds, namely, the pure personalty and £500 of mixed personalty, which they may devote to the purposes of the gift.

It is then contended by Mr. *Bristowe* that, at all events, the £500

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(1) 8 Hare, 208; 10 Hare, 480.

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should be apportioned between the mixed and pure personalty. But I take it the true construction is, that you are to place in the hands of trustees all that they may use for either of the purposes which the testatrix has mentioned. You place in their hands, therefore, all her pure personalty, and you place in their hands so much of the mixed personalty as amounts to £500, and hand over the rest to the next of kin. When you have done that, they, having these two funds in their disposition, may apply the £500, if they think fit, wholly in building, and they may apply the whole of the other fund, which is pure personalty, towards the other object which the testatrix had in view. No doubt there would be a difficulty in giving the trustees an option of determining how much should go to the next of kin, and how much should not. But in fact it would be the duty of the trustees to apply the fund in the manner which would make the gift most effectual, as it would be the duty of trustees to do in the case of infants when they are directed to apply a fund towards their maintenance in the most beneficial manner. In this case it will be the duty of the trustees to carry out the intentions of the testatrix as effectually as they can.

The decree of the Vice-Chancellor must be varied, and it must be declared that the sum of £500 out of the mixed personalty, and the whole of the pure personalty, must be set apart for the residuary trust, but subject to the inquiry hereinafter directed, and without prejudice to any question in case the inquiry should be answered in the negative.

Then direct an inquiry whether the fund can be so used or employed.

Reserve further consideration. The costs of the appeal to be costs in the cause.

Solicitors: Messrs. *Raven & Bradley*; Mr. *E. Balden*, agent for Mr. *F. R. Roberts, Aberystwith*; Messrs. *Jones, Blaxland, & Son.*

L. C.
1871
Nov. 23.

PHILLIPS *v.* MULLINGS.

[1870 P. 72.]

Voluntary Settlement—Clauses—Explanation—Power of Revocation.

14 Eq. 372-4
376-8
6 Ch 494
15 Ch D 574
570
23 Ch D 280

In order to support a voluntary settlement, it must be shewn that all the provisions are proper and usual; or if there are any unusual provisions, that they were brought to the notice of and understood by the settlor.

No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is not essential.

A young man of improvident habits, being entitled to a sum of money, was induced by the trustee of the money, and by a solicitor, to execute a settlement by which he assigned a part of the money to trustees on trust to invest and to pay him during his life the income on such part thereof as they should think fit, and after his death on trust to hold the same for his wife and children, if any, and subject thereto on trust for certain cousins of his. He had no power of appointment in default of issue, and no power of revocation, and no power to appoint new trustees. The deed was explained to him, and the particular clauses were brought to his notice:—

Held (affirming the decree of *Stuart*, V.C.), that the deed could not be set aside by the settlor.

Coutts v. *Acworth* (1); *Wollaston* v. *Tribe* (2); *Everitt* v. *Everitt* (3), considered.

J. W. PHILLIPS, the Plaintiff in this case, attained the age of twenty-one years on the 1st of December, 1868, and then became entitled to a sum of £3000 under the will of his reputed father. *H. Mullings,* a solicitor of *Cirencester*, was the trustee of this fund, and as *Phillips* was of improvident habits, *H. Mullings,* who still retained the money, in May, 1869, suggested that *Phillips* should make a settlement of £2000 out of the fund. A deed to that effect was accordingly prepared by *W. H. Herbert*, the solicitor of *Phillips,* and was fully explained to *Phillips,* who objected to settle £2000, and wished to settle £1000. The deed was altered accordingly, and explained to *Phillips,* who marked with his initials the alterations as to the sum; and ultimately *Phillips* executed the deed.

It bore date the 19th of June, 1869, and was made between

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(1) Law Rep. 8 Eq. 558.

(2) Law Rep. 9 Eq. 44.

(3) Law Rep. 10 Eq. 405.

Phillips, of the one part, and *J. Mullings* (a brother of *H. Mullings*) and *Herbert*, of the other part. By this deed, after reciting that *Phillips* was possessed of the sum of £1000, to which, with a further sum of money, he became entitled on attaining the age of twenty-one years, and that he was desirous of settling the same sum, it was declared that *Mullings* and *Herbert* should stand possessed of the £1000 upon trust, at their discretion, to invest the same on the usual investments, and to apply the income thereof, or so much thereof as the trustees should consider might beneficially be so paid and applied, unto *Phillips*, or any wife or child or children of his, during his life; and as to any part of the income not so applied, to accumulate the same, and to stand possessed of the fund and the accumulations after the death of *Phillips*, in trust for his widow, if any, during her life, as he should appoint, and subject thereto in trust for any children of his as he should appoint, and in default of appointment, for the children who should attain the age of twenty-one years; and if there was no such child, then, subject as aforesaid, in trust for the four children of one *Clement Tudway*, a cousin of *Phillips*. Power to appoint new trustees was given to the trustees named in the deed.

The money was accordingly paid to *Mullings* and *Herbert*, and invested by them.

Phillips, in April, 1870, filed the bill in this suit against the trustees and the four children of his cousin, alleging that he did not understand the nature of the settlement, and did not know that the £1000 would be placed out of his control, and praying that the settlement might be delivered up to be cancelled, and that the £1000 might be transferred to him.

The trustees submitted that the deed was for the benefit of *Phillips*, but were willing to act as the Court should direct. The children of *Tudway* submitted to have the deed varied if the Court thought fit.

There was evidence that *Phillips* approved the omission of a power of appointment in default of children.

The Vice-Chancellor *Stuart*, on the 17th of February, 1871, dismissed the bill with costs, the costs of the trustees to be retained by them out of the income.(1)

The Plaintiff appealed.

(1) See W N (1871) 41

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Mr. *Dickinson*, Q.C., and Mr. *Cracknall*, for the Plaintiff:—

The Plaintiff was a foolish young man, and knew nothing about the deed he was executing. He never had the money in his own hands, and did not know that he could have it; the recitals in the deed are incorrect: *Prideaux* v. *Lonsdale* (1); *Cooke* v. *Lamotte* (2).

Moreover, there is no power of revocation, and that is fatal to such a deed: *Coutts* v. *Acworth* (3); *Wollaston* v. *Tribe* (4); *Everitt* v. *Everitt* (5). The young man has been needlessly deprived of all control over the investment, and of the appointment of new trustees. Such defects vitiate a deed of this description: *Lister* v. *Hodgson* (6); *Phillipson* v. *Kerry* (7).

Mr. *Hardy*, Q.C., and Mr. *Warmington*, for the trustees, supported the deed. They cited *Bill* v. *Cureton* (8), *Petre* v. *Espinasse* (9).

Mr. *L. Field*, for the other Defendants.

Mr. *Dickinson*, in reply.

LORD HATHERLEY, L.C.:—

This case is somewhat remarkable in its circumstances, and as to the authorities which have been cited, I must observe that cases of this description must depend upon the facts, though certain principles, no doubt, are laid down for the guidance of those who may be minded to deal with their property as this young man dealt with his, and of those who have to give them advice.

These principles rest on a broad basis established by a series of decisions. It is clear, for instance, that any one taking any advantage under a voluntary deed, and setting it up against the donor, must shew that he thoroughly understood what he was doing, or, at all events, was protected by independent advice.

Again, it is clear that a solicitor, who advises a client for his

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(1) 4 Giff. 159; 1 D. J. & S. 433.

(2) 15 Beav. 234.

(3) Law Rep. 8 Eq. 558.

(4) Ibid. 9 Eq. 44.

(5) Law Rep. 10 Eq. 405.

(6) Ibid. 4 Eq. 30.

(7) 32 Beav. 628.

(8) 2 My. & K. 503.

(9) 2 My. & K. 496.

(1) LC 9 Jur NS 488, 507

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own protection to take a particular step of this nature, does assume a very responsible duty; and where a person is induced to execute such a deed, it must, in order to support the deed, be shewn that the nature of the deed was thoroughly understood by the person executing it.

But the cases have not gone further. Some cases, however, have attempted to lay down what ought to be in such an instrument. It has, for instance, been almost laid down in *Coutts* v. *Acworth* (1), that where there is no power of revocation the deed will be set aside; and *Wollaston* v. *Tribe* (2) and *Everitt* v. *Everitt* (3) have been relied on as favouring the same view. But whether there should be a power of revocation or not must depend upon the circumstances; and it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation.

14 Eq 373-4
3 Ch 8
8 Ch 434

[His Lordship then commented on the facts as shewing that this young man was of extravagant and improvident habits, and that the trustee and the solicitor thought it advisable that some of the property should be settled, so that he should not be left destitute, and that there should be some provision for any wife and children he might have. As to the limitations over, it seemed that he was illegitimate, and, therefore, unless there was a limitation over, the money would go to the Crown. As to there being no power given to him to appoint in default of issue, that might have invalidated the deed; but that was proved to have been clearly explained to and approved of by him.]

Those who induce a young man of this description to execute such a deed are bound to shew either that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved of it. It was objected that he was deprived of all power over the investments, but I think, under the circumstances, that was not unreasonable, as he was exceedingly indiscreet. Another objection was, that the money had never been in his own hands, which was said to render the case analogous to *Prideaux* v. *Lonsdale* (4). But this only shews the inutility of referring to other cases, for here he clearly knew that he had power to receive this and the other money.

(1) Law Rep. 8 Eq. 558.
(2) Ibid. 9 Eq. 44.
(3) Law Rep. 10 Eq. 405.
(4) 4 Giff. 159; 1 D. J. & S. 433.

9 Jur NS 480, 587

Another objection was, that he had not the power of appointing new trustees, but that does not seem to call for special remark.

As to a power of revocation, it seems to me that if such a power had been inserted, the young man's money would merely have been wasted, and that no one but the solicitor would have derived any benefit from the deed; for of what advantage would it be to place the money in this way out of the young man's control, and then give him power to destroy the limitations whenever he pleased?

All that the law requires in a deed of this description is that it should be effective, and should not contain any extraordinary clauses, unless those clauses are shewn plainly and distinctly to have been brought to the notice of the settlor, and to have been understood by him. It is not necessary to shew that the usual clauses inserted by conveyancers were explained; but any unusual clauses must be shewn to have been brought to his notice, explained and understood.

I agree with the Vice-Chancellor that this deed must stand, and the appeal will be dismissed with costs.

Solicitor for the Plaintiff: Mr. *O. Richards.*

Solicitors for the Defendants: Mr. *W. H. Herbert;* Mr. *J. H. Kays.*

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TRAPPES *v.* MEREDITH.

[1868 T. 101.]

Will—Forfeiture—Bankruptcy—Words of Futurity.

12 Ch D 158-9
6 App Cas 475
480
21 Ch D 282

A testatrix, knowing that her husband was bankrupt, gave by her will a life annuity to her husband, subject to a proviso that if he should become bankrupt or should assign the annuity, then it should cease, and subject to a further proviso, that it should be lawful for the trustees of her will at any time to refuse payment of the annuity, which in that case was to go over:—

Held (reversing the decision of *James*, V.C.), that the existing bankruptcy operated as a forfeiture of the annuity, notwithstanding the words of futurity in the will and the discretion given to the trustees.

H. C. T. GRAHAM was, in May, 1861, upon his own Petition, duly made a bankrupt in *Scotland*, and a sequestration of his estate was awarded according to Scotch law, and a trustee was elected and declared under the sequestration.

In May, 1863, Mrs. *Graham*, the wife of *H. C. T. Graham*, being aware of the sequestration, and having a power of appointment over certain funds, subject to the life interest therein of her mother Mrs. *Payne*, by her will appointed the funds to trustees on trust to pay her debts and certain legacies; and the will contained the following clauses:—

1. " And upon further trust that my said trustees shall, out of the income of the said trust premises, or if that shall be insufficient, then out of the principal thereof, pay to my husband an annuity of £100 during his life (but subject to the provisoes with respect to the said annuity hereinafter contained), the said annuity to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after the decease of the survivor of me and my said mother." 2. " Provided always, and I do hereby declare, that if my said husband shall become bankrupt or shall assign, charge, or incumber, or attempt or affect to assign, charge, or incumber the said annuity of £100, or do or suffer any act whereby the same or any part thereof would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity shall not be payable, or shall cease to be payable, as the case may require, in the same manner as if my husband were dead." 3. " Provided also, and I hereby further declare, that it shall be lawful for my said trustees or trustee, if they or he shall in their or his absolute discretion think fit, and without assigning any reason for so doing, at any time or times to refuse or discontinue the payment to my said husband of the said annuity of £100, or any part thereof, during the whole or any portion of his life; and in such case the said annuity, or such payment or payments thereof as my said trustees or trustee shall refuse to make to my said husband as aforesaid, shall sink into the income of the said trust premises for the benefit of the person or persons for the time being entitled to such income; it being my wish and intention that the payment of the said annuity to my said husband shall be according to the discretion of my said trustees or trustee in all respects."

By a codicil the annuity was increased to £150.

Mrs. *Graham* died in June, 1864, and Mrs. *Payne*, the tenant for life of the trust funds, died in April, 1868.

On the 29th of August, 1868, Mr. *Graham* obtained his discharge under the sequestration, without the consent of the creditors, and without making any composition with them, and without disclosing to the trustee or to the Court the existence of Mrs. *Graham's* will. On the 10th of February, 1869, the trustee under the sequestration was discharged. None of these proceedings would, according to Scotch law, divest out of the trustee any property which had become vested in him.

A suit was instituted for the administration of the funds which were subject to the will of Mrs. *Graham*, and the Vice-Chancellor *James* held that an English bankruptcy, to which Mr. *Graham* had afterwards become subject, did not operate as a forfeiture of the annuity under the will, inasmuch as the first payment had not accrued until after the bankruptcy was annulled: See *Trappes* v. *Meredith* (1).

At a further hearing, the question as to the effect of the Scotch sequestration was argued, and the Vice-Chancellor *James* held that the sequestration did not operate as a forfeiture, and that the annuity remained subject to the discretion of the trustees under the will (2). The trustees elected to pay the annuity to Mr. *Graham*, and did make one payment accordingly.

The persons interested in remainder appealed. The appeal came on to be heard on the 30th of January, 1871, when the Lord Chancellor directed it to stand over for further evidence as to the Scotch law, and he finally, on the 1st of March, 1871, ordered a special case to be directed to the Court of Session in *Scotland*, with questions for the opinion of the Scotch Judges as to the effect of the sequestration.

The case was argued before the Lords of the First Division in *Scotland*, and they, on the 3rd of November, 1871, made answer to the questions. Their answers appeared to be: 1. That the annuity would, under the 1st clause, without the other clauses, have vested in the trustee, and not have been divested by the discharge of the bankrupt without the assent of his creditors. 2. That the 2nd

(1) Law Rep. 9 Eq. 229.

(2) Law Rep. 10 Eq. 604.

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clause operated as a forfeiture. 3. That the 3rd clause, taken by itself, would not create a forfeiture, but would leave the trustee under the sequestration to take only *tantum et tale,* or, in other words, so much as the trustees under the will might choose to leave in the husband.

The appeal now came on again for hearing.

Mr. *De Gex,* Q.C., Mr. *Fry,* Q.C., and Mr. *Pontifex,* for the Appellants:—

The 2nd clause is valid, and has created a forfeiture: *Webb* v. *Grace* (1). There is a gift until bankruptcy or death; and the testatrix meant that if her husband was at the time of her death capable of taking the annuity, he should take it; if not, it should not go to him. Clauses 1 and 3 contemplate one set of events, and clauses 1 and 2 contemplate another set of events; and it is that latter set which have happened: *White* v. *Chitty* (2).

Mr. *Kay,* Q.C., and Mr. *Bradford,* for Mr. *Graham*:—

The testatrix clearly intended to make the exercise of discretion by the trustees preliminary to anything being vested in the bankrupt or his assignees. She knew that her husband was bankrupt, and made this provision accordingly. It is clear that she did not intend the 2nd clause to include the existing bankruptcy, as if so, the gift would be useless.

Mr. *Bristowe,* Q.C., and Mr. *C. Barber,* for the trustees.

Mr. *Willcock,* Q.C., and Mr. *Townsend,* for other parties.

Mr. *De Gex,* in reply.

LORD HATHERLEY, L.C., having stated the facts of the case, and what he considered to be the opinion of the Scotch Judges, which was as above mentioned, continued:—

Now that being so, the question arises whether this case falls within the principle of *Manning* v. *Chambers* (3), decided by the Lord Justice *Knight Bruce,* and *Seymour* v. *Lucas* (4), decided by

12 Ch. D. 158

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(1) 2 Ph. 701.
(2) Law Rep. 1 Eq. 372. 12 Jur. N.S. 181.
(3) 1 De G. & Sm. 282.
(4) 1 Dr. & Sm. 177.

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Vice-Chancellor *Kindersley*—cases which, I think, are completely founded in reason and good sense. In accordance with those cases I, in *White* v. *Chitty* (1), came to the conclusion that words of futurity in a gift of this description are not to operate so as to defeat the manifest intention of the testator, that the gift shall be a personal benefit to the legatee, and shall not become payable to any other person. Upon that principle there would have been no reason for doubting that by the 2nd clause of the will a complete forfeiture had taken effect; because the clause directs that if the whole or any part of this annuity became vested in another person and not in the donee, then from that moment the annuity should cease to be payable.

The only difficulty in the case has arisen from the 3rd clause: and what the Scottish Judges say upon that point is entirely consonant with what would be our views on the subject. The difference of the two clauses is obvious. The one creates an immediate and total forfeiture of the whole gift, and the other creates a special forfeiture of the gift in favour of other persons, to whom the successive payments are to go over whensoever they are refused by the trustee. But that state of things, according to the opinion of the Scotch Judges, would not alter the right of the trustee under the sequestration to the annuity; and he would take it *tale et tantum* (to use their words), if the 2nd clause had not existed and created a forfeiture. Any other construction would simply make the 2nd clause inoperative.

The Vice-Chancellor seems to have been led to the conclusion to which he came by considering that whatever might be the rule in ordinary cases as to words descriptive of a future bankruptcy, in this case there were words which might be expressly directed to an existing bankruptcy. But it seems to me that we must attribute to the testatrix a very complicated design for her will, if we hold that she intended the trustees to have this discretion only on the existing bankruptcy, and not on any future bankruptcy; though the discretion would be quite as beneficial in one case as in the other. I apprehend that, knowing her husband to be extravagant and imprudent, and that it might happen that the annuity would be quite wasted on him, the testatrix intended to give her trustees an

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(1) Law Rep. 1 Eq. 372. 12 Jur N S 181.

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absolute discretion as to the payment. At the same time she wished that the annuity should by no possibility get into the hands of strangers, either by her husband's bankruptcy or by his assignment.

I think that this case cannot be distinguished from those which I followed in my decision of *White* v. *Chitty* (1)—I use that expression purposely—and I think it too great a refinement to hold that the 3rd clause of this will indicates a different intention.

The decree of the Vice-Chancellor must therefore be reversed; and I shall make a declaration that in the events which have happened the annuity has fallen into the general fund.

Solicitors: Mr. *V. Southee*; Messrs. *Rooks, Kenrick, & Harston*; Messrs. *Meredith & Co.*

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[1869 N. 47.]

L. C.
1872
Jan. 22, 23, 26.

Will—Gift to a Wife for the Benefit of Herself and her Children.

A testator gave all his real and personal estate to his wife for the use and benefit of herself and all his children, whether born of his former or of his then present wife, and he appointed his wife and three other persons his executors:—

Held (reversing the decision of *Malins*, V.C.), that the wife and children took as joint tenants.

14 Eq 285,
416
23 Ch D
530

THIS was an appeal from a decision of Vice-Chancellor *Malins* (2).

Henry Newill, late of the *Madras* Civil Service, made his will, dated the 19th of October, 1863, in the following words: "I give and bequeath unto my wife, *Anna Elizabeth Newill*, for the use and benefit of herself and of all my children, whether born of my former wife, or such as may be born of my present wife, all my property of every description, real and personal, whether in possession, reversion, remainder, or expectancy at the time of my decease; and I appoint the said *Anna E. Newill* executrix of this

(1) Law Rep. 1 Eq. 372.

(2) Law Rep. 12 Eq. 432.

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my will, together with *Joseph Newill*, my father, or, in case of his failing to act, my brother *R. D. Newill* in his stead); also *Hudleston Stokes* and *Charles Gilbert Masters* as executors."

The testator died on the 25th of April, 1869, leaving six children by a former wife, and two children by *Anna Elizabeth Newill.* One child had died since the institution of the suit. The personal estate realised by the executors amounted to about £6000, and the testator was not entitled to any real estate.

The testator's widow and children were stated to be entitled to annuities of various amounts payable out of the *Madras Civil Service Pension Fund,* but the widow, having since married, had lost a portion of her pension. The suit was instituted by the children of the first marriage for the purpose of having the trusts of the will carried into execution, and for the administration of the estate.

The Vice-Chancellor was of opinion that the widow was entitled to an estate for life, with remainder to the testator's children as joint tenants; and from this decision the Plaintiffs appealed.

Mr. *Pearson,* Q.C., Mr. *W. Pearson,* and Mr. *Holmes,* for the Appellants:—

The plain grammatical construction of the words must prevail, which clearly gives to the wife and children an immediate estate as joint tenants. Similar words were used in *De Witte* v. *De Witte* (1), and the Vice-Chancellor held that an immediate joint tenancy was created. *Bustard* v. *Saunders* (2); *Bibby* v. *Thompson* (3); *Buffar* v. *Bradford* (4); *Beales* v. *Crisford* (5); *Mason* v. *Clarke* (6), are also authorities in our favour. In all the cases where such a gift has been held to confer an estate for life on the wife, with remainder to the children, there has been some evidence of an intention to settle the fund, or else some words of severance rebutting the presumption of a joint tenancy. In the present case the state of the family renders it improbable that the testator would wish to give the whole fund to his wife for life; for he had children by a former wife, who required support.

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(1) 11 Sim. 41.
(2) 7 Beav. 92.
(3) 32 Ibid. 647.
(4) 2 Atk. 220.
(5) 13 Sim. 592.
(6) 17 Beav. 126.

17 Jun 479

Mr. *Marcy*, for the guardian of the infant children, supported the arguments of the Appellants.

Mr. *Glasse*, Q.C., and Mr. *Rogers*, for the widow:—

We admit that at one period the decisions were in favour of the Appellants, but the current of recent authorities has been the other way. Where a man gives property to a stranger and her children, it may be reasonable that all should take immediately as joint tenants. But where a testator gives property to his own wife and children, especially if it is his whole estate, as here, he must be presumed to have intended to settle it upon them; and the Court, therefore, so construes the gift as to effectuate his intention: *Dawson* v. *Bourne* (1); *Jeffery* v. *De Vitre* (2); *Audsley* v. *Horn* (3); *Ward* v. *Grey* (4); *Crockett* v. *Crockett* (5); *Armstrong* v. *Armstrong* (6); *In re Owen's Trusts* (7). In the present case we have the additional circumstance that the property is not given directly to the wife and children, but to the wife as a trustee for herself and the children, which is in itself an indication in favour of a settlement.

Mr. *Pearson*, Q.C., in reply.

Jan. 26. LORD HATHERLEY, L.C.:—

In this case the point is an extremely short one; it turns upon the few words contained in the will which direct that all the testator's real and personal estate is to go to his wife "for the use and benefit of herself and of all my children." Now it was admitted that ordinarily a bequest to *A.* in trust for himself and *B.*, *C.*, and *D.*, would be a bequest of a joint legacy to the parties who are so designated, including the trustee himself. But it has been argued—and the authorities, no doubt, give support to the argument—that the case of a gift to a wife in trust for herself and her children is subject to an exceptional rule of construction, by which, from

(1) 16 Beav. 29.
(2) 24 Ibid. 296.
(3) 26 Ibid. 195. 4 Jur. N.S. 1267
(4) 26 Beav. 485. 5 Jur. N.S. 948
(5) 2 Ph. 553.
(6) Law Rep. 7 Eq. 518.
(7) Law Rep. 12 Eq. 316.

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some presumed intent on the part of the testator, the Court will lay hold of every small circumstance to support the conclusion that the testator intended what the Court, upon some presumed rule, conceives to be his most natural intention *à priori*, and will modify such a bequest into a bequest to the wife for life, with remainder to the children. That such a rule does not exist as an absolute rule of construction, independently of other expressions in the will which may assist in the construction of the gift, is proved by the case of *De Witte* v. *De Witte* (1), before Vice-Chancellor *Shadwell*—a case which was approved of, or at all events mentioned without disapproval, by Lord *Cottenham* in the case of *Crockett* v. *Crockett* (2). Lord *Cottenham* there seems to say that generally, in a gift to a wife and children, the ordinary rule of joint tenancy must prevail, but he adds that the Court has laid hold of every slight circumstance to lead to the other conclusion.

Now I confess that the authorities clearly shew that very small circumstances have been so laid hold of, and I must therefore assume, in accordance with the reasoning of those who have preceded me, although it does not entirely commend itself to my mind, that the testator, independently of any expression of intention, must be supposed *à priori* to have intended to make a settlement of any fund which he might be disposed to leave to his wife and children. It is true that the law, in case of intestacy, makes no such settlement, but gives at once one-third to the wife and two-thirds to the children as tenants in common. A provision for the wife and children in joint tenancy does not seem, to my mind, *à priori*, a very unreasonable mode of disposing of a small property, such as £5000 or £6000, which this testator had. It does not seem unreasonable that while the children are under age they and his wife should enjoy the fund together under the control of the wife. The children, while under age, cannot sever the joint tenancy, and as each comes of age he can carry away his portion, leaving the wife a smaller portion for herself and the other children.

In this particular case, as far as the circumstances go, it would seem to be still more reasonable, because there are other children of the testator, besides the children of this wife, who are to be

(1) 11 Sim. 41.

(2) 2 Ph. 553.

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provided for; and the second wife being a very young person, the effect of giving her a life interest would of course be to keep out the children of the first marriage for a very considerable time from any benefit at all of the testator's estate, although they may have attained the age of twenty-one years.

14 Eq 410
23 CLD

However, I must assume that the rule is such, that although the ordinary construction of a gift to a wife and children would give a joint tenancy, if I find anything in this will which can indicate a different intention, it must be followed. There are several authorities which establish such a rule, but in almost all of them reliance has been placed on some special circumstances. One of these has been the use of the word "secured," which the Court has laid hold of as a circumstance indicating an intention to settle the fund in the usual mode on the wife for life. Another circumstance has been a direction that the children should take shares in the whole fund, or that they should take in unequal shares. Of course they could not take as joint tenants if they take unequal shares of the fund; and if the children take shares of the whole fund, of course the wife cannot take any part of it *in solido* as capital. In that case the only thing that can be given her is an estate for life.

Then, again, where the wife was left with a disposing power and control over the fund, Lord *Cottenham* held, in *Crockett* v. *Crockett* (1), that as she had, at all events during her life, power of dealing with the property as she might think fit, a tenancy for life was probably intended rather than an immediate gift of a joint tenancy. But in that case Lord *Cottenham* did not give any definite direction as to what should be done with the fund beyond securing it, and did not decide what would be the extent of the power of the wife, or her control over it.

A case was also cited which was before the present Lord Justice *James*, *Armstrong* v. *Armstrong* (2), in which, however, it was not necessary to decide the point, because the wife happened to die in the lifetime of the testator, and therefore the children would take *quâcumque viâ*. But the Vice-Chancellor expressed a strong intimation of his opinion in favour of the construction which settled the property upon the wife for life, with remainder to the

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(1) 2 Ph. 553.

(2) Law Rep. 7 Eq. 518.

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children. In that case I think there was very good reason upon the face of the will for coming to that conclusion, because there was a direction that in a certain event some of the children were to take larger shares than others, which plainly indicated that the testator's meaning could not have been, in the strict sense, a joint tenancy at once between the wife and children. The only indication of intention that I have here is that the fund is given to the wife in trust for herself and her children, and the question is asked, as was asked by Lord *Cottenham* in *Crockett* v. *Crockett* (1), why, if he intended them all to take as joint tenants, should he name the wife at all as trustee? She is executrix of the will, but that is only with three other persons, and it is asked why he should not have left it in the possession of all the executors, and why he should have separated it from the aggregate estate, unless he intended something in the nature and character of a settlement?

I cannot find that the authorities bear out the proposition that a simple gift to the wife in trust for herself and her children will warrant the Court in presuming that the fund was intended to be settled. Many reasons may be suggested for the fund being given in that form. The testator associates his executors, in whom he reposed confidence, with his wife in the executorship, and wishes them to assist her in getting in the estate, paying his debts, and attending to those duties which his wife alone might not be competent to discharge; and then he might very well say that, as soon as his estate was got in, he wished the executors to part altogether from the management of his affairs, and the whole to be handed over to his wife, the most natural person whom he could select; and what is there in the joint tenancy between her and her children more inconsistent with her having the management of the whole fund, than there is in a tenancy for life with remainder to her children? It appears to me very natural for her to keep the whole fund in her possession as long as the children remain under age, handing over the share of each as soon as that child comes of age; and unless, therefore, I am told by the testator that the fund is to be secured, or that it is to be divided as a whole fund, or unless there is some other such indication as has been relied upon in the cases, I do not think it right to overrule *De*

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(1) 2 Ph. 553.

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Witte v. *De Witte* (1), recognised as that case has been by Lord *Cottenham* in *Crockett* v. *Crockett* (2), and founded, as it appears to me, upon the plain sense of the words used. If it were to be laid down as a general rule that, although a gift to *A.*, *B.*, and *C.*, is a gift in joint tenancy, that construction is not to apply to a gift to a wife and children, it would be another matter; but if the change of construction is to depend on the circumstances, I confess that I cannot find any circumstances on the face of the will which lead me to the conclusion that the testator meant anything more than he said.

The decree of the Vice-Chancellor must, therefore, be reversed.

Solicitors for the Plaintiffs: Messrs. *Sharp & Ullithorne.*

Solicitors for the Defendants: Messrs. *Clayton & Son.*

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Trustee—Equal Equities—Legal Estate—Notice—Breach of Trust.

The defence of purchase for value without notice may be sustained, although the Defendant, in order to make out his title to the legal estate, must rely on an instrument which discloses the title of the Plaintiff, the Defendant not having had notice of such instrument at the time of his purchase.

The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee of the settlement afterwards reconveyed part of the property to the mortgagor on payment of part of the mortgage money, which he appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing, with the connivance of the trustee, both the prior mortgage and the reconveyance. When the fraud was discovered, the *cestuis que trust* under the settlement filed a bill against the new mortgagees claiming priority:—

Held, that the Court would not interfere to take away the legal estate which passed to the new mortgagees under the reconveyance.

The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee afterwards induced the mort-

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(1) 11 Sim. 41. (2) 2 Ph. 553.

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gagor to execute a deed by which the mortgaged property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mortgage, and shewing title under the pretended purchase deed, conveyed the property to a mortgagee without notice:—

Held, that the Court would not interfere to take away the legal estate from the mortgagee.

Decree of the Master of the Rolls reversed.

Carter v. *Carter* (1) disapproved of.

8 Ex 270
17 Eq 17
9 Ch 83.
5 P C 259
18 Eq 229, 230
9 Ch 744
18 Eq 559, 562
10 Ch 27
15 Ch D 642
18 Ch D 569
570, -2
19 Ch D 211
20 Ch D 620
626

THIS was a suit to establish the priorities of *cestuis que trust* as mortgagees over other mortgagees who had obtained the legal estate with, as alleged, notice of the trust.

On the 23rd of August, 1830, a settlement was made by *Jeremiah Pilcher*, under which *J. G. Pilcher*, *G. Pilcher*, and *W. H. Pilcher* were to stand possessed of £8373 in trust for *Jeremiah Pilcher* during his life, and after his death for his children by a former marriage. There was power to the trustees to vary the investments with the consent of *Jeremiah Pilcher* during his life. The settlement contained the usual trustees' receipt clause, and a power of appointing new trustees exerciseable by *J. Pilcher* during his life.

In 1851 the £8373 was advanced to *Robert Rawlins* on the security of a mortgage deed dated the 23rd of April, 1851, and made between *R. Rawlins*, of the first part, *J. G. Pilcher*, *G. Pilcher*, and *W. H. Pilcher*, of the second part, and *J. Pilcher*, of the third part; whereby, after reciting that *J. G. Pilcher*, *G. Pilcher*, and *W. H. Pilcher* had agreed to lend and advance the sum of £8373 (the same being trust money) with the consent and approbation of *J. Pilcher*, it was witnessed that certain real property, including the *Whitchurch* property and the *Smithfield* and *New Street* property hereinafter mentioned, was conveyed by *Rawlins* to *J. G. Pilcher*, *G. Pilcher*, and *W. H. Pilcher*, their heirs and assigns, subject to redemption on payment of interest and of the £8373, on the 23rd of April, 1856.

Upon the execution of this deed the documents of title relating to the property were delivered to *W. H. Pilcher*, who was a solicitor, to be held by him on behalf of himself and his co-trustees. *J. G. Pilcher* and *G. Pilcher* died in 1853, leaving *W. H. Pilcher* sole trustee.

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(1) 3 K. & J. 617. 4 Jur NS 63,

In 1856 *Rawlins*, who had been a solicitor, made out, with the connivance of *W. H. Pilcher*, an abstract of title ending with a document earlier than the above-mentioned mortgage, thus shewing a title in fee simple in himself; and induced two trustees named *Stockwell* and *Lamb* to advance him £10,000 on the security (with other property) of the *Whitchurch* property, part of the property comprised in the above-mentioned mortgage; and by a deed dated the 2nd of April, 1856, it was witnessed that *Rawlins* conveyed the *Whitchurch* property to *Stockwell* and *Lamb* in fee, subject to redemption on payment of the £10,000 in the usual manner.

On the same 2nd of April, 1856, and prior to the execution of the mortgage to *Stockwell* and *Lamb*, *W. H. Pilcher* had executed an indenture, which was unstamped until after this suit had been instituted, and which apparently was not to have been used unless it became necessary to use it. By this indenture it was witnessed that *W. H. Pilcher*, in consideration of the payment to him by *Rawlins* of £3500, conveyed the *Whitchurch* property to *Rawlins* in fee discharged from the mortgage debt of £8373. No receipt was indorsed on this deed, which was only produced after the institution of this suit, and was then handed by *Rawlins* to *Stockwell* and *Lamb*, who thus discovered that they had the legal estate, though not by the deeds on which they had relied. *Rawlins* and *W. H. Pilcher* appeared to have shared the £10,000 advanced by *Stockwell* and *Lamb;* and the title deeds of the *Whitchurch* property, with the exception of the mortgage deed of 1851 and the reconveyance, were delivered to *Stockwell* and *Lamb*.

Under a second settlement also made by *Jeremiah Pilcher* on the 23rd of August, 1830, *W. H. Pilcher* was, in 1860, the surviving trustee of a sum of £3000 held in trust for *Jeremiah Pilcher* and his second wife, and the children of a second marriage. This sum had been advanced to *Rawlins* on the security of the property comprised in the mortgage of the 23rd of April, 1851, and of certain other property, both of which were conveyed to the trustees of the settlement by a mortgage deed dated the 30th of May, 1854, and containing notice of the settlement. *W. H. Pilcher* was also co-executor with one *J. H. Ward* of the estate of one *J. Matthews*, and having received £3000, part of the estate, he, in November, 1860, agreed to give to *J. H. Ward* security for the £3000; and with that

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in view, *W. H. Pilcher* and *Rawlins* acted as follows: By a deed purporting to be a purchase deed, and dated the 11th of April, 1861, *Rawlins*, in consideration of £2590, expressed to be paid to him by *W. H. Pilcher*, purported to convey to *W. H. Pilcher* the *Smithfield* and *New Street* property. A receipt for £2590 was indorsed, but no money actually passed. *W. H. Pilcher* then delivered an abstract of title, suppressing the mortgages of 1851 and 1854, and shewing a title in fee simple in himself. This was accepted by the conveyancing counsel of the Court of Chancery, and a mortgage was executed by *W. H. Pilcher* conveying these properties to *Ward* as security for the £3000.

W. H. Pilcher continued until 1864 to pay the interest due on the trust funds to *J. Pilcher*. In July, 1865, *J. Pilcher* called upon *W. H. Pilcher* to hand over the deeds, and received from him a box containing the two mortgage deeds only, the result of which was that the dealings of *W. H. Pilcher* and *Rawlins* were then in part discovered.

Jeremiah Pilcher and his children thereupon filed their bill in this suit against *Rawlins*, *W. H. Pilcher*, *Stockwell* and *Lamb*, *Ward*, and others, praying that the priorities of the charges affecting the property comprised in the mortgage of 1851 might be ascertained, and that *Stockwell* and *Lamb* as to the *Whitchurch* property, and *Ward* as to the other property mortgaged to him, and forming part of the securities of 1851 and 1854, might be restrained from dealing with the legal estates vested in them, and that directions might be given for conveying such legal estates for the security of the Plaintiffs.

The Defendants *Stockwell* and *Lamb* and the Defendant *Ward*, by their answers, pleaded that they were purchasers for value without notice, and claimed the benefit of the legal estates vested in them respectively.

The Master of the Rolls was of opinion that the mortgage of 1851 had priority over the mortgage to *Stockwell* and *Lamb* and over the mortgage to *Ward*, and made a decree accordingly, as reported (1), where the facts of the case are more fully stated.

The Defendant *Lamb* (*Stockwell* being dead) and the Defendant *Ward* appealed.

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(1) Law Rep. 11 Eq. 53.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *H. Humphreys*, for *Lamb*:—

We contend, in the first place, that the mere mention of the fact of the money being trust money was not enough to bind any one to look for the *cestuis que trust.* Besides, after all, a fair proportion of the mortgage money was actually paid, and to the proper person to receive it; it is true that he has misapplied it, but we are not liable. It was said that the money was paid before the day for redemption, and that only part of it was paid, which rendered the concurrence of *Jeremiah Pilcher* necessary; but such refinements are shocking to common sense. Any refinements should be on our side, for it was the Plaintiffs, and not we, who, by trusting *W. H. Pilcher*, and leaving him sole trustee, enabled him to commit this fraud. *Carter* v. *Carter* (1) went perhaps too far, but this goes still further. We say that we have the legal estate, and that there is no equity to deprive us of it: *Maundrell* v. *Maundrell* (2); *Bates* v. *Johnson* (3). The whole doctrine of attendant terms depends upon this. We had, when we advanced the money, neither actual nor constructive notice of the prior mortgage, and our equity is as good as that of the Plaintiffs—in fact better, for they chose to trust a sole trustee. We trusted no one, and took our mortgage in the regular way, and after due investigation of the title. No doubt we were not aware of the reconveyance to *Rawlins*, but by that means we get the legal estate, and we ought not to be deprived of it. We are purchasers for valuable consideration. We ask no relief; we only ask to be let alone. *Ex parte Knott* (4) was a clear case. In *Jones* v. *Powles* (5) the trustee was interested, as in this case. *Dodds* v. *Hills* (6) is in our favour. The Plaintiffs do not venture to ask that the reconveyance should be set aside, but ask that the legal estate conveyed by it may be dealt with to protect them. But why? Why are we to be deprived of it?

Sir *R. Baggallay*, Q.C., and Mr. *Ferrers*, for *Ward*:—

We claim the benefit of all the arguments on behalf of *Stockwell* and *Lamb*, but our case is stronger. We have in no sense been

(1) 3 K. & J. 617. 4 Jur NS 63
(2) 10 Ves. 246.
(3) Joh. 304. 5 Jur NS 842
(4) 11 Ves. 609.
(5) 3 My. & K. 581.
(6) 2 H. & M. 424.

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guilty of laches. No doubt the conveyance to *Pilcher* was intended as a blind, and deceived us; but we have without it the legal estate, and we are purchasers without notice, and with the legal estate.

Mr. *Southgate*, Q.C., and Mr. *Bristowe*, Q.C., for the Plaintiffs:—

We, too, are innocent, and we have the earliest equity. It was against conscience that our trustee should deal as he did, and legal estates so obtained cannot be set up. The legal estate can be claimed only through a deed which shews the trust, and thus those who take under it are bound by it. *Rawlins*' deeds conveyed nothing, because there was a prior deed; and if the deed of 1851 had been produced, as it must be, to make out the title to the legal estate, the mortgagees would have been bound to call for production of the deed of 1830, and then *W. H. Pilcher* could not have committed these frauds. There is no case in which a trustee has, in derogation of his duty, conveyed the legal estate, and the person taking the legal estate has been allowed to avail himself of it. *Carter* v. *Carter* (1) only followed *Willoughby* v. *Willoughby* (2) and *Saunders* v. *Dehew* (3). No doubt, if you take a conveyance for valuable consideration without notice, you can, when you find out a fraud, protect yourself by getting in a legal estate; but you cannot do so if you have notice at the time; and here the Defendants cannot shew their title without shewing notice. If a man paid his money on a forged deed, he could not afterwards, by getting in the legal estate, protect himself. It is not true that the Plaintiffs have trusted the trustee; on the contrary, they gave notice on the mortgage deeds that it was trust money: *Phillips* v. *Phillips* (4); *Colyer* v. *Finch* (5). Can the Court allow a trustee, who is the creature of the Court, to injure his *cestuis que trust* in this way? The mortgagees claim under a fraud; we do not. In *Jones* v. *Powles* (6) the facts could not, by any reasonable diligence, have been discovered.

Mr. *Kingdon*, who was with them, was not heard, as two counsel on that side had been heard.

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(1) 3 K. & J. 617. 4 Jur NS 63,
(2) 1 T. R. 763.
(3) 2 Vern. 271.
(4) 4 D. F. & J. 208. 8 Jur N.S. 145
(5) 19 Beav. 500; 5 H. L. C. 905.
(6) 3 My. & K. 581.

(5) LC 18 Jur 935; 3 Jur N.S.

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Mr. *Roxburgh*, Q.C., and Mr. *Drewry*, for the representatives of *W. H. Pilcher*, who was dead.

Mr. *Shapter*, Q.C., Mr. *W. Pearson*, and Mr. *H. C. Ward*, for other parties.

The *Solicitor-General*, in reply.

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Jan. 29. Lord Hatherley, L.C., after stating the facts of the case, continued :—

The Defendant *Rawlins* could not have transferred the legal estate in the property except through the medium of the reconveyance of 1856, and the Master of the Rolls considered the case to be similar in that respect to the case of *Carter* v. *Carter* (1). The authority of that case has been strongly impugned in argument by the counsel for the Appellants, and the decision is, I believe, not approved of by the Lords Justices. That case may be thus briefly stated: *John Carter*, the mortgagor, believing himself to be entitled, under the will of his father, to certain shares in real estate in fee, conveyed his shares and all other his estate and interest in the property by way of mortgage to the mortgagee. This was done in good faith, but subsequently a later will was discovered by which the mortgagor took an estate in fee, but in trust for himself for life only, and as to the remainder in fee, in trust for several persons and objects mentioned in the will. The mortgagee, a Defendant in the suit, insisted that he was entitled to hold the fee of the mortgaged shares as against the *cestuis que trust* in remainder, *John Carter* having conveyed to him the fee of such property without any notice of the trusts under the second will. I held that this could not be so, the only title to the fee in *John Carter* being that which, on its face, disclosed the title of his *cestuis que trust*; in fact, that either I must have made *John Carter*, without any evil intention or want of care on his part, guilty of a gross breach of trust, and have then suffered the fruits of that breach of trust to be enjoyed by his mortgagee, or I must have said that a title was not acquired by the mortgagee against the equitable owner.

(1) 3 K. & J. 617. 4 Jur NS 63

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I did not follow a case of *Fausset* v. *Carpenter* (1), decided by Lords *Tenterden* and *Wynford*, but greatly disapproved of by Lord *St. Leonards* in his treatise on the Law of Property as Administered in the House of Lords (2). In that case a conveyance made by a trustee having both a legal and an equitable interest in the land, and conveying in general terms, was held not to pass the estate held by him as the trustee. I thought that the legal estate of *John Carter* did pass, it being his clear intent to pass the fee which he supposed to be his own; but I thought that I was entitled to say to the mortgagee: "You cannot say you have contracted for the estate of the *cestuis que trust*, to which the mortgagor could only make a title by the second will, which will disclosed the trusts."

The case now before us differs in many respects from the case of *Carter* v. *Carter* (3). An intentional fraud has been committed, and the parties to it have been enabled to effect their purpose owing to the *cestuis que trust* allowing the trustee, originally one of three, to become the sole trustee. As sole trustee he necessarily had possession of the title deeds to the mortgaged estate; so that, by the reconveyance to the mortgagor, the mortgagor became repossessed of the legal estate, and, by keeping back the whole mortgage transaction, was enabled to shew a complete legal title to the property. Had he disclosed the mortgage, I think that the mortgage deed would have put the parties dealing with him on inquiry; but as matters were conducted, the mortgagee acquired the legal estate, and entered into possession of the property without notice of the prior charge, and he must, I think, be entitled to hold it.

The plea of purchase without notice states only possession on the part of the professed owner, conveyance of the estate, and absence of notice; and the cases undoubtedly have gone very far (as I had occasion to observe in *Carter* v. *Carter*) in shewing that on such a plea, when proved, equity declines all interference with the purchaser, having, as is said, no ground on which it can affect his conscience. I confess that the extent to which this doctrine has been carried was not wholly satisfactory to me when I decided *Carter* v. *Carter*. There neither the mortgagees, the purchaser, nor the mortgagor had the slightest notion that the transaction

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(1) 2 Dow. & Cl. 232; 5 Bli. (N.S.) 75. (2) Page 81.
(3) 3 K. & J. 617. 4 Jur NS 163

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was one in which the mortgagor was dealing with the interest of others. The mortgagees had taken all the estate of *John Carter* under the first will, which was found afterwards to be a nullity; the fact of the mortgagor under the supposed will having an estate vested in him, in trust for others, being unknown to both parties. I confess that if this case had been of the same character I should hesitate long before I held that the estates of the *cestuis que trust* could be so conveyed, or that the ignorance of the mortgagor could make him guilty of a breach of trust, or that his act executed wholly *diverso intuitu* could dispose of interests in which he had no concern.

Suppose a conveyance made by a man without title, and that afterwards the real owner makes this man a trustee of a settlement, and conveys the estate to him, would the *cestuis que trust* lose the estate by the estoppel of their trustee under his conveyance?

Or, suppose that a person who conveyed in the belief that he had a title, and afterwards, as heir of the real owner, acquired the legal estate by the death of a devisee in trust in the lifetime of a testator, and only on the trusts of a will, would the *cestuis que trust* in that case lose their estate?

I referred in *Carter* v. *Carter* (1) to the observations of Lord *Eldon* in *Maundrell* v. *Maundrell* (2), and *Ex parte Knott* (3), as to the difficulty of allowing a purchaser to hold an estate which was got in by him from a person who could not convey without committing a breach of trust; and it appeared to me then, as now, that Lord *Eldon* applied his observations to a case in which the purchaser had advanced his money in good faith, but took the legal estate afterwards from one whom he knew to be a trustee for others, distinguishing that case from the case of a legal estate acquired by paying off a mortgage. In itself it is immaterial whether the purchaser knows or not that another has an equitable interest prior to his own, provided he did not know that fact on paying his purchase-money. It may perhaps be sufficient in all possible cases for the purchaser to say, "I am not to be sued in equity at all. I hold what was conveyed to me by one in possession, who was, or pretended to be, seised, and who conveyed to me without my having notice of another equitable title;" and

(1) 3 K. & J. 617. 4 Jur
N. S.

(2) 10 Ves. 246.

(3) 11 Ves. 609.

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that the Plaintiff in equity must disprove the plea before he can proceed any further with his suit. But I know of no case either before or since *Carter* v. *Carter* (1), in which the legal estate so conveyed to the purchaser was held by the vendor on express trusts appearing on the face of the only instrument under which the vendor could make a complete title, so that a trustee of a settlement comprising estates of any magnitude, and being in possession on behalf of a minor, for instance, could, by forging a conveyance to himself, pass an indefeasible title to a purchaser.

The present case is not such a case, and I can therefore concur with the view of the Lords Justices that the decree must be reversed.

SIR W. M. JAMES, L.J. :—

I entirely concur in the conclusion to which the Lord Chancellor has arrived.

I do not mean, in the few observations which I am about to make, to refer to a class of cases which appear to me entirely distinct in principle from the case now before us. I mean that class of cases in which a person finding himself in possession under a defective title has cast about to cure that defect by procuring some one else to convey an outstanding legal estate. No doubt it has been held in this Court that a man under those circumstances may get in a mortgage and tack his defective title to the estate of that mortgagee. He has also been allowed to get in an outstanding legal estate from a person who, being a trustee for the real owner, is not a trustee for the person seeking the conveyance. But those cases where the person seeking the conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance—those cases, I say, involve a principle which I have never been able to understand.

18 Eq 562

I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

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(1) 3 K. & J. 617. 4 Jur ns 563,

18 Eq 229

In the case of *Carter* v. *Carter* (1), which was decided by the present Lord Chancellor, and which was followed by the Master of the Rolls in this case, and with which I am bound to say I am unable to agree, an exception from that rule was, under the circumstances, supposed to exist.

It is very clearly expressed in a few lines of the judgment in that case: "But here the purchaser taking the conveyance under one will, supposed by all parties to be really the last will of the testator, finds himself driven to rely upon another and a second will containing on the face of it all the trusts which the testator has created;"—and that circumstance is supposed to create the exception. To my mind there are to that supposition two short and conclusive answers—the one a matter of principle, and the other a matter of fact. My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him, and has no right to put him to contest the question, how he is going to defend himself, or what he is going to rely on. He may say, honestly and justly, "I am not going to tell you. I have got the deeds; I defend them, and you will never be able to make me produce them, and you will never be able to produce secondary evidence of them. I am not obliged to produce them

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(1) 3 K. & J. 617. 4 Jur NS 63,

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at all; probably before you get half way through your action of ejectment you will find a *jus tertii* which you will not dispose of; the estate is in the hands of a legal tenant to whom I have let it, and no one can determine that tenancy without notice, and no one can give that notice but myself; I will not give that notice, and no Court has any power to compel me to give it. I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me." That seems to be exactly the position of such a purchaser as this.

The purchaser in *Carter* v. *Carter* (1) did not rely on the will which created the trust; he relied on another title; for the will formed the title of the adverse party. And the answer to that adverse party is, by the good luck which sometimes attends honest men, "Though you produce an instrument which points out your title, and gives the property to some one else, yet I am prepared with a legal defence in a conveyance which was executed before." It appears to me that there is no right in this Court to prevent the purchaser from setting up that defence to the claim so made against him. If there was ever a case in which, according to my judgment, any Court ought to be in favour of a purchaser and against such a title, it is a case in which a testator has, through the grossest negligence, allowed two wills to exist after his death, so that some members of his family produce one will apparently making out a perfectly good title to a mortgagee or purchaser, and then, when a mortgagee or purchaser has been induced unwittingly to pay or advance his money, some other members of the family produce the other will, which has been suppressed or concealed during the whole of that time, and then seek to take the estate away from the mortgagee or purchaser. It seems to me to be a very ingenious device by which a testator would be able to give his property twice over to his family; but, in my opinion, it is a device which ought not to be encouraged in any way in a Court of Equity.

I am therefore of opinion that whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money and is in possession of the

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(1) 3 K. & J. 617. 4 Jur N. 163

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property, he is entitled to the benefit of that accident, just as a purchaser would be entitled to avail himself of the possession so acquired, without any reference to the rights of the persons who may be otherwise interested.

In the course of the argument it was sought to draw a distinction in these cases where the object is to ascertain priorities; but even in suits of that nature the legal title is inquired into. I apprehend that when a mortgagee is in possession of the legal estate there is no equity to make him reconvey (in my judgment that is the test), and he is entitled to hold it until every part of his incumbrance has been paid.

It was said in argument that where a man has a second incumbrance on an estate, but has the legal right of possession, and the legal right to the possession of the deeds, he has been made to produce those deeds. I apprehend that that cannot be right except under these circumstances: If a man, being, as he may well be, second incumbrancer on an estate, and also in law the owner of the deeds, seeks to avail himself of the assistance of the Court for the purposes of giving effect to his charge upon the estate, then it may be right to force him to bring in anything which he may have. I do not say anything about that, if he is availing himself of the assistance of this Court to redeem the first mortgagee or to be redeemed himself. But where a man has got the deeds, and has got a puisne incumbrance, and says, "I do not want the assistance of the Court; I disclaim any interference on the part of the Court to deal with the property as it pleases; I am perfectly content to rest on my possession of the deeds"—if he is minded to say that, I apprehend that he has as much right to retain the deeds in his box as he would be entitled to keep possession of a box of diamonds if they had been pledged with him by way of collateral security.

The decision in the case of *Carter* v. *Carter* (1), which has been so much referred to, is a decision which I have considered for some years, and I have more than once thought it right to express my views of that case. I differ in some respects in my views from those of the Lord Chancellor with regard to that case, but I say that the right of a person without notice is absolute and unqualified, when once he has made it out.

(1) 3 K. & J. 617. 4 Jur NS 63.

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SIR G. MELLISH, L.J.:—

I agree in the conclusion to which the Lord Chancellor and the Lord Justice have arrived. I do not think it necessary to give any opinion whether *Carter* v. *Carter* (1) was rightly decided. In my opinion if it is to be supported it must be supported upon the grounds stated by the Lord Chancellor to-day, namely, that there were such peculiar circumstances in that case as to make it inequitable that the purchaser should be allowed to rely upon the second will. But I think it cannot be supported on the grounds upon which the Master of the Rolls thought it had been decided, and upon which the Master of the Rolls acted in the case now before us. The Master of the Rolls, as I understand his judgment, held that a purchaser for valuable consideration, who has obtained a conveyance of the legal estate, is in this Court always to be held to have notice of the contents of the deeds which form a link in the chain by which the legal estate was conveyed to him. And he held that the doctrine of constructive notice ought to be enlarged, and that, although in point of fact the deed in question was never produced to the purchaser—although he had neither knowledge nor the means of knowledge of its contents—although he and his advisers were guilty of no negligence whatever in not obtaining knowledge of its contents—yet, nevertheless, he must in this Court be held to have notice of the contents, if it was a deed which, when ejectment was brought against him in a Court of Law, he would be bound to produce.

It is admitted that that rule has never been laid down prior to the case of *Carter* v. *Carter*; there were not even *dicta*, or any authority whatever that I have been able to find, tending to shew that any such rule had prevailed in this Court; and I am of opinion most clearly that it ought not to be so laid down.

I do not agree with the Master of the Rolls that the purchaser for valuable consideration in such a case as he describes, is approbating and reprobating. A person who approbates and reprobates is acting inconsistently. He must, in fact, be affirming and denying the same proposition at the same time. But I cannot see any such inconsistency here. If an action of ejectment is brought, it is wholly immaterial whether the Defendant in that action of ejectment had or had not at any time whatever notice of the con-

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(1) 3 K. & J. 617. 4 Jur N.S. 83

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tents of the deed or instrument on which he rests his title. What inconsistency is there in his saying, "If I am attacked in a Court of Law, and an action of ejectment is brought against me, I rely on this deed as being one of the deeds through which the legal estate has been conveyed to me?" and then, if he is attacked in a Court of Equity, saying, as the truth is, "I had no notice of this deed. At the time when I obtained my conveyance I had no knowledge and no means of knowledge of the deed." I cannot see that there is any inconsistency in his so acting.

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The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely, that this Court will not take an estate from a purchaser who has bought for valuable consideration without notice; and I find that the Appellants in both the cases before us are very clearly purchasers for valuable consideration without notice. Unless this doctrine of constructive notice, enlarged as it has been by the Master of the Rolls, is to prevail, I am of opinion that the Appellants have made out their case.

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As it is admitted that, with the exception of what is supposed to have been said in *Carter* v. *Carter* (1), this rule of constructive notices, as laid down by the Master of the Rolls, has never been established, I will proceed to consider it a little upon principle. It happens, curiously enough, that in one, if not in both, of the two cases before us the Appellants are themselves trustees for other *cestuis que trust,* and the question then arises which of the two sets of *cestuis que trust* are to bear the loss. Is the loss to fall upon the *cestuis que trust* whose trustee has fraudulently conveyed away the estate which was entrusted to him? Or is the loss to fall upon those whose trustees have honestly taken a conveyance of that estate and who have advanced the money of their *cestuis que trust* on the faith of that estate which they have really got?

It is surely desirable that the rules of this Court should be in accordance with the ordinary feelings of justice of mankind. Now if the first set of *cestuis que trust,* those who will unfortunately have to bear the loss, were asked how it happened that they had suffered this loss, they would answer that their father conveyed the estate to their uncle, and he turned out to be a dishonest man, and parted with the estate. That is an explanation which any ordinary man of intelligence would understand. It might not be satisfactory to the losers, but they must see at once how it came to happen that they lost their estate. If you trust your property to a man who turns out to be a rogue, it stands to reason that you may lose it. But supposing the Master of the Rolls' doctrine to prevail, and supposing the other *cestuis que trust* to be asked how they had lost their property, the answer would be, "Our trustee invested our property on mortgage on the faith of a person who said that he had the legal estate, and who had it, and who conveyed it to our trustee as a security for the sums advanced, our trustee being guilty of no negligence whatever, having taken the advice of a perfectly competent conveyancer in order to see that the title was a good one. But the Court of Chancery says that we have lost it because our trustees had notice of the prior mortgage; though they had, in fact, no notice whatever. They had neither knowledge nor means of knowledge, but nevertheless the Court of Chancery says that, according to its doctrine, they had notice." The only conclusion which any one would come to is that these *cestuis que trust* had been deprived of their property by the Court of Chancery, for reasons which, to an ordinary mind, were perfectly incomprehensible.

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(1) 3 K. & J. 617. 4 Jur NS 83.

I am clearly of opinion, whether, under the peculiar circumstances of that case, *Carter* v. *Carter* (1) was rightly decided or not, as to which I will say nothing, that where a trustee in breach of trust conveys away a legal estate which he possesses, and that legal estate comes into the possession of a purchaser for valuable consideration without notice, that purchaser can hold the property against the *cestuis que trust* who were defrauded by the conveyance of the trustee; and that it makes no difference whatever that if the purchaser is challenged in a Court of Law, and an action of ejectment is brought against him, he may have to rely upon some deed which was in fact concealed from him, and of which he had neither knowledge nor means of knowledge.

Solicitor for the Plaintiffs: Mr. *S. W. Johnson.*

Solicitors for the Defendant *Lamb:* Messrs. *Johnson & Weatherall.*

Solicitor for the Defendant *Ward:* Mr. *W. Prideaux.*

Solicitors for other Defendants: Messrs. *Hancock, Saunders, & Hawksford;* Mr. *J. E. Pilcher.*

(1) 3 K. & J. 617. 4 Jur N.S. 163.

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[1867 H. 238.]

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Dec. 5, 6, 22.

Will—Remoteness—Limitations after an Estate Tail—" Issue "—Joint Tenancy or Tenancy in Common—" Then Living."

7 Ex 24
4 Ch D 1
11 Ch D 88
8 QBD 5
20 Ch D 4

No limitation after an estate tail is void for remoteness; and it makes no difference whether the limitation be directly to a class or to trustees to sell and divide among such class, provided the legal and beneficial interests be ascertainable at the determination of the estate tail.

If a clause in a will offends against the rule against perpetuities, yet, in construing the will, such clause cannot be disregarded, but must be read as the expression of the testator's intention as though no such rule existed.

A testator directed his trustee, after the failure of limitations for life and in tail, to sell his real estate and pay a share of the proceeds to the children, other than *J. G. H.*, of *A. H.* "then living," and the issue of such as should be then dead leaving issue, and the issue of *J. G. H.*, share and share alike, the issue of the said children of *A. H.* to have no greater share than their parent would have had if living, and the issue of *J. G. H.* to share on the same footing. The testator gave another share to *C.* for life, and after her death to the children of *A. H.* then living, and their issue, in the same words as in the gift of the former share.

At the close of the will the testator added a proviso that if his real estate should ever be sold under the limitations thereinbefore contained, and the money should become payable to the issue of *A. H.*, or the issue of *J. G. H.*, and any of such issue should be then dead leaving lawful issue, then the issue of such issue as should be so dead should receive the share which his or her parent would have been entitled to if living. The estates tail failed, and the proceeds of the sale became divisible:—

Held (reversing the decision of *Malins*, V.C.), that the proviso at the end of the will was not void for remoteness:

That the " issue " of the grandchildren of *A. H.* must be confined to their children:

That where a grandchild of *A. H.* died before the period of distribution leaving children, such children took the share which their parent would have taken if he had been alive at the period of distribution, even in a case where the grandchild died before his parent in the lifetime of the testator and before his will:

That the gift to the grandchildren created a joint tenancy *inter se*, but the effect of the proviso was, that in the case of a grandchild dying leaving issue, the joint tenancy was severed as to his share.

THIS was an appeal from part of a decree of Vice-Chancellor *Malins* (1).

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(1) Law Rep. 11 Eq. 522.

Anr pt under same will post 646.
See an ante pt arising on compromise

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The questions in the suit arose on the construction of the will of *William Gratwicke,* dated the 3rd of March, 1819.

The testator devised the residue of his real estate to trustees in fee to the use of his grandson *W. G. Kinleside* for life, with remainder to the use of his children in tail, and in default of such issue to the use of his granddaughter *Jemima Elizabeth Kinleside* for her life, with remainder to her children in tail; and in default of such issue to the use of the trustees in fee, in trust to sell and divide the moneys arising from the sale into three equal parts or shares.

And as to one-third part or share thereof, upon trust to transfer or pay and divide the same "unto and amongst all and every the children of my sister *Amy Heasman,* deceased, except my nephew *John Gratwicke Heasman,* who shall be then living, and the issue of such of them as shall be then dead leaving issue, and the issue of my said nephew *John Gratwicke Heasman,* except his son *John West Heasman,* share and share alike, but so as the issue of such of the children of my said sister *Amy Heasman* as shall be then dead shall have no greater share than their, his, or her deceased parents would have had if living; and so as the issue of my said nephew *John Gratwicke Heasman* shall have no greater share than the issue of any other of the children of my said sister *Amy Heasman,* deceased, is directed to have in case of the decease of their, his, or her parent."

And as to another third part or share, upon trust to pay the income to his sister *Jane Croker* during her life, and after her decease to divide the same third part or share into moieties, and to transfer, pay, and divide one moiety thereof [here were repeated the words above given between inverted commas], and to pay the income of the other moiety to his sister *Philadelphia Jupp* during her life, and after her decease to transfer or pay and divide such last-mentioned moiety unto such persons and in such manner as the third part or share next after-mentioned, and directed to be paid and applied after the decease of the said *Philadelphia Jupp.*

As to the remaining third part or share, upon trust to pay the income thereof to his sister *Philadelphia Jupp* during her life, and after her decease to transfer, pay, and divide such third part or share unto and amongst all and every the children of the said

Philadelphia Jupp who shall be "then living," and the lawful issue of such of her children as shall be then dead leaving such issue, equally, share and share alike, but so as such issue shall have no greater share thereof than such as their, his, or her deceased parent would have had if living.

The testator bequeathed the residue of his personal estate to the same trustees, upon trust to pay the income to his grandson *William Gratwicke Kinleside* during his life, and after his decease in trust for the children of the said *William Gratwicke Kinleside* who should be then living, and the lawful issue of such of his children as should be then dead leaving issue; and in default of such issue, in trust for his said granddaughter *Jemima Elizabeth Kinleside* during her life, and after her decease in trust for her children and other issue in like manner; and in default of such issue, he directed that the said residue should be paid, applied, and disposed of in such and the same manner, and for such and the same intents and purposes, as the moneys to arise by sale of his said real estates were thereinbefore directed to be paid and applied.

The will contained clauses for the appointment of new trustees, and the appointment of executors and the indemnity of trustees. At the end of the will there was this clause: "Provided always, Post 661.
and to prevent all doubts which might otherwise possibly arise, I do hereby direct and declare my will to be, that if it shall happen that my real estate shall ever be sold under the limitations or devises hereinbefore contained, and the money thereby arising, and the residue of my personal estate, or any part thereof respectively, shall, under or by virtue of this my will, ever become payable to the issue of my said late sister *Amy Heasman*, deceased, and my sister *Philadelphia Jupp*, or the issue of my nephew *John Gratwicke Heasman* (except his son *John West Heasman*), or any of them, and any one or more of such issue, shall be then dead having left lawful issue, then the issue of such issue as shall be so dead shall have and receive the part or share to which their, his, or her parent would have been entitled to if living."

Amy Heasman died on the 20th of March, 1798; the testator died on the 21st of August, 1821; *Jane Croker* died on the 13th of December, 1821; *Philadelphia Jupp* died on the 25th of

February, 1832; *William Gratwicke Kinleside* died on the 5th of December, 1862, a bachelor. *Jemima Elizabeth Kinleside* married Dr. *Archdell*, who took the name of *Gratwicke*, and she died on the 26th of September, 1867, without having had issue.

Amy Heasman (besides children who died unmarried before the date of testator's will) had two children, namely, *John Gratwicke Heasman* and *Amy*, the wife of *Richard Newland*.

John Gratwicke Heasman died in 1850, and (besides his son *John West Heasman*, excluded by the will, and besides children who died unmarried before the date of the testator's will) had two daughters, *Mary Heasman*, now living, and *Frances Heasman*, who died in 1861 without having been married.

Amy Newland died in 1825 and (besides children who died without being married before the date of the testator's will) she had had the following children: Three who survived her, viz., *William*, who died unmarried in 1839; *Francis Rudwick*, who died in 1850, leaving issue *Thomas*, who died in 1845 leaving issue; *Mary Corney*, who died in 1861 without leaving issue; and other children—one who died before the date of the testator's will, and another who died in the testator's lifetime; both of whom left issue, who or whose issue were still living.

Philadelphia Jupp (besides children who died in the lifetime of testator without being married) had issue three children: two who survived her, viz., *Charlotte Holmes* and *William Jupp*, and one, viz., *George Spencer Jupp*, who died in her lifetime in 1819, leaving children who survived him, some of whom were dead and some still living.

Under these circumstances the present bill was filed by *Mary Heasman*, the only surviving child of *J. G. Heasman*, for the purpose of ascertaining the persons entitled to the proceeds of sale of the real estate and the leaseholds of the testator. The Vice-Chancellor decided, among other points not the subject of the present appeal, that the proviso at the end of the will, respecting the issue of deceased issue, was void under the rule against perpetuities, and that the gifts should be construed without reference to that proviso; that the word "issue" in the gift—the issue of the children of *Amy Heasman* and the issue of *J. G. Heasman*, in the second clause—must be read "children," and that such issue

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took as joint tenants *inter se.* He also held that the words "then living," in the gift of one moiety of the third share given to *Jane Croker* for life, which was given to the family of *Amy Heasman,* referred to the period of distribution; but that the same words in the gift of the third share, given to *Philadelphia Jupp* for life, referred to the death of the tenant for life.

His Honour accordingly decided that the moiety of the proceeds of the whole estate given to the family of *Amy Heasman* went in equal moieties to the Plaintiff, the second child of *J. G. Heasman,* and the legal personal representative of *Mary Corney,* the surviving child of Mrs. *Newland.*

From this decision, so far as it related to the shares of *Amy Heasman's* family, the grandchildren of Mrs. *Newland,* being children of *Francis Rudwick Newland* and *Thomas Newland,* appealed.

Mr. *Cole,* Q.C., and Mr. *Miller,* for the Appellants:—

We contend, first, that the proviso at the end of the will respecting the issue of deceased issue was valid. The rule against perpetuities does not apply to limitations to take effect after an estate tail, because they are destructible by the tenant in tail: *Morse* v. *Lord Ormonde* (1); *Egerton* v. *Lord Brownlow* (2); *Co. Litt.* (3); *Cole* v. *Sewell* (4); *Fearne's* Contingent Remainders (5); *Lewis* on Perpetuities (6). But whether the clause be void or not, it must be taken into account in construing the other provisions of the will. It expresses the testator's intention, and cannot be rejected. We contend that *Amy Newland's* children took, not as joint tenants, but as tenants in common: *Martin* v. *Holgate* (7); *King* v. *Cleaveland* (8); *Nickolls* v. *Sheffield* (9); *Lyon* v. *Coward* (10); *Hodges* v. *Grant* (11). The words "then living," both in the gift of the original one-third part to *Amy Heasman's* family, and in the gift to them of a moiety of *Jane Croker's* one-third, must refer to the period of distribution.

Mr. *Shapter,* Q.C., and Mr. *Stallard,* for the Plaintiffs, were

(1) 1 Russ. 382.
(2) 4 H. L. C. 1.
(3) 272, a, Butler's note.
(4) 2 H. L. C. 186.
(5) 522, Butler's note.
(6) 154, s. 99.
(7) Law Rep. 1 H. L. 175.
(8) 4 De G. & J. 477.
(9) 2 B. C. C. 215.
(10) 15 Sim. 287.
(11) Law Rep. 4 Eq. 140.

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desired to confine themselves to the question of whether the children of *Amy Newland* took as joint tenants or tenants in common.

In order to exclude joint tenancy there must be clear words of severance. The words "share and share alike" do not apply to the issue. *Lyon* v. *Coward* (1) must be considered as overruled.

Mr. *Kay*, Q.C., and Mr. *Shebbeare*, for the administrator of *Mary Corney*:—

The gift was to a class made up of children and grandchildren. The word "issue" must be read "children," as in *Sibley* v. *Perry* (2). It was necessary that the issue should survive their parent, but not that they should survive the tenant for life: *In re Wildman's Trusts* (3); *Martin* v. *Holgate* (4). The words of the gift create a joint tenancy, not a tenancy in common: *Penny* v. *Clarke* (5); *Bridge* v. *Yates* (6); *M'Gregor* v. *M'Gregor* (7); *Coe* v. *Bigg* (8); *Lanphier* v. *Buck* (9); *In re Pell's Trusts* (10).

The proviso at the end of the will was only to remove an ambiguity as to the share of *J. G. Heasman*, and referred to that share alone. It was meant to explain, not to alter, any of the gifts.

Mr. *Miller*, in reply, referred to *In re Hotchkiss' Trusts* (11), *Christopherson* v. *Naylor* (12), *Jarvis* v. *Pond* (13), and *Giles* v. *Giles* (14).

Dec. 22. SIR W. M. JAMES, L.J., delivered the judgment of the Court as follows:—

This is an appeal from part of the decree pronounced by Vice-Chancellor *Malins*—from that part of the decree which affected the interests of what may be briefly called the *Heasman* branch of the family of the testator.

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(1) 15 Sim. 287.
(2) 7 Ves. 522
(3) 1 J. & H. 299. 7 Jur NS 121.
(4) Law Rep. 1 H. L. 175.
(5) 1 D. F. & J. 425. 6 Jur NS 307
(6) 12 Sim. 645.
(7) 1 D. F. & J. 63.
(8) 1 N. R. 536.
(9) 2 Dr. & Sm. 484.
(10) 3 D. F. & J. 291.
(11) Law. Rep. 8 Eq. 643.
(12) 1 Mer. 320.
(13) 9 Sim. 549.
(14) 8 Sim. 360.

The facts, and the material portions of the will on which the question arises, are fully set out in the report of the case before the Vice-Chancellor (1). The scheme of the will was to provide a series of limitations of the real estate for life with remainders in tail, with an ultimate remainder to trustees for sale, and a gift of the produce of sale, which ultimate remainder and gift are what the Court has to deal with.

The testator gave his residuary personal estate to his grandson *W. G. Kinleside* for life, with remainder to his children or other issue living at his death, and if he should die without children or issue living at his death, then to his granddaughter *J. G. Kinleside* for life, with a like remainder; and in default of her dying without children or issue then living, the personal estate was to go in the same manner as the produce of the real estate.

The general scheme of the ultimate gifts was this: The testator had had three sisters, and he divided his property into thirds; one third he gave to the family of his deceased sister Mrs. *Heasman;* one third he gave to his living sister Mrs. *Jupp* and her family; and as to another third, he gave an estate for life only to another sister, Mrs. *Croker*, and she being an aged childless woman, he directed that third to go in moieties between the *Heasmans* and the *Jupps*, using exactly the same words of gift as those in which their own original thirds were given to them.

The words of the gift to the *Heasmans*, the gift now before us, are as follows:—[His Lordship read the gift to the *Heasman* family, and continued:—]

At the time the testator made his will, *Amy Heasman* had in fact only two children—the *John Gratwicke Heasman* who is mentioned and excluded, and Mrs. *Newland;* and all her other children had then died without having been married, so that the gift was, in fact, to Mrs. *Newland* and her issue, and to the issue of *J. G. Heasman*, other than his eldest son, who was excluded. The gift, therefore, was a gift to Mrs. *Newland* or to her issue, if she should be then dead leaving issue, and to the issue of *J. G. Heasman*, other than his son *J. W. Heasman*, as tenants in common; with a declaration that the issue of Mrs. *Newland* should take no greater share than the parent would have done, and that the issue

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(1) Law Rep. 11 Eq. 522.

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of *J. G. Heasman* should take no more than the issue of Mrs. *Newland.*

According to the rule in *Sibley* v. *Perry* (1), the word "issue" would have to be read "child" in the gift to Mrs. *Newland's* family; and, assuming that the same meaning would be given to the word "issue" in the gift to *J. G. Heasman's* issue, then the gift would read thus: "To Mrs. *Newland*, if she should be then living, or her children, if she should be then dead leaving children, and the children of my nephew *J. G. Heasman*, other than *J. W. Heasman*." The words create a tenancy in common between the two families. But, according to the ordinary rule of construction, each set of children would take as joint tenants. So, also, according to the ordinary rule of construction, no children of Mrs. *Newland* would have taken unless they had survived her; and if all her children had died in her lifetime, leaving numerous issue, they would have taken nothing, and there would have been an intestacy as to that share.

It is to be noted, moreover, that there is no such condition affixed to the gift to *J. G. Heasman's* children. Beyond question, all his children who were in existence at the date of the testator's will and afterwards came into existence would have taken vested interests; and, having regard to the whole scope of the bequest, which was to put the descendant families of *Amy Heasman* on an equality, the motive of the gift being that they were such descendants, it would be very singular that the children of Mrs. *Newland* should take only contingent interests, and the children of *J. G. Heasman* should take vested interests.

But the testator himself, at the end of his will, has added a clause expressly to prevent all doubt. The Vice-Chancellor came to the conclusion that that ultimate clause offended against the rule as to perpetuities, and was therefore to be struck out.

We are unable to concur in what the Vice-Chancellor is reported to have said as to the rule against perpetuities, or as to striking out the clause if it did offend against such rule. No limitation after estates tail is, as the Vice-Chancellor himself points out, too remote; and it appears to us clear that, whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and to divide the produce amongst such class, is wholly immaterial, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail. Moreover, it is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found to be the testator's wishes must be taken to be his wishes, and if those wishes offend against the rule, the gifts would fail, and must fail accordingly; but they are not the less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established.

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(1) 7 Ves. 522.

Then, what is the light thrown upon the bequests in question by the ultimate proviso? There is a clear intimation of the testator's intention that the death of a legatee dying before the period of division, if there should be any issue then surviving, should not deprive that legatee's issue of their share of the family provision. The gifts to the issue of Mrs. *Newland*, to the issue of Mrs. *Jupp*, to the issue of *J. G. Heasman*, are all put together and evidently referred to as gifts of the same character; and it is quite clear that he did not intend that if any one of a class died leaving issue, his share should go over to the others of that class.

It was contended that, in order to give effect to the explanatory proviso, we should treat the gifts to the issue, not as gifts in joint tenancy, but as gifts to them as tenants in common. We are unable to accede to that view. It would be the more natural view of the proviso to consider that it proceeds on the assumption that there is originally a joint tenancy, and proceeds to prevent the mischief which would arise where one of the joint tenants lives to have and leave issue, and then dies, by severing the joint tenancy as to that share. We are of opinion that such is the effect of the proviso, and that where any of Mrs. *Newland's* children, who would have taken if they had survived, have died leaving issue, the children take the place of the parent, and in all respects the property is to be divided as if the parent had survived, but as if he had survived having severed the joint tenancy as to his share. We add

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this qualification, because equality and mutuality are of the very essence of joint tenancy, and when a share is, by any act or upon any contingency, exempted from surviving, it follows, or is to be implied, that it is not to take any accruer from any other share. We are compelled, therefore, to differ from the Vice-Chancellor, such difference being, in fact, the necessary result of his excluding the explanatory proviso, which we have admitted, in ascertaining the true construction. The children of *Francis Rudwick Newland*, who died leaving children, and the children of *Thomas Newland*, who also died leaving children, themselves having survived Mrs. *Newland*, are, according to our construction, clearly entitled to share. But we have to consider whether the children of two other children, who died in the testator's lifetime, and consequently before the mother, leaving children, are or are not to be included.

Now, in considering this, it is not unimportant to observe how the gifts to Mrs. *Newland's* family and to her brother's family affect each other. If the gift to *J. G. Heasman's* issue had stood unaffected by the context as to Mrs. *Newland's* issue, and unaffected by the proviso, it would have been a gift to all the issue, however remote, who were in existence at the date of the will, and came into existence afterwards up to the period of distribution, progenitors and offspring all taking on an equal footing, and no distribution *per stirpes*. But by reference to the context, to the provision that the issue of the nephew was to take no greater share than the issue of any other of the children, and to the language of the explanatory proviso, it is manifest that the word "issue" in the one gift must be cut down, as in the other gift, to "children." But still the class would embrace all the children of *J. G. Heasman* who were in existence at the date of the will and came into existence afterwards; and it would certainly be the more reasonable intention to attribute to the testator that he meant the same class to take in *Amy Newland's* family as would take in her brother's family. As by the proviso he takes in the children of children deceased, it is scarcely within the bounds of reasonable probability that he meant to make a distinction between the grandchildren whose parents survived, and the grandchildren whose parents did not survive, their parents. It appears to us that the proviso at the end introducing the grandchildren is fairly capable of a reasonable interpretation consistent with a reasonable intent on the part of the testator and with the general scope of his will. The words introducing the grandchildren are: "If any one or more of "such" issue shall be then dead, having left lawful issue." If, instead of the relative words "such issue," we repeat the very words of the antecedent—that is, if we read thus: "If any one or more of the issue of my said late sister *Amy Heasman*, &c., shall be then dead, having left lawful issue"—then the very events which have happened have been literally provided for, and the grandchildren the children of Mrs. *Newland* would be put on exactly the same footing as the grandchildren the children of her brother. According to this view the children of the two who so died before the testator would share. There would be in all, according to our view, six shares; two shares would go to those two sets of children as joint tenants, then of the other four, the share of *William*, who died childless in 1839, would survive to his three co-tenants who survived him, and those three would therefore take four sixths, the shares of those who died leaving children going to such children as joint tenants.

There remains the question of the moiety of the third of which Mrs. *Croker* was tenant for life. If that gift had stood alone, it would have vested in Mrs. *Newland* herself, as the "then" would have referred to the death of Mrs. *Croker*; but seeing that such third was only secured for the purpose of giving Mrs. *Croker* a life interest, and that then the words of gift to the *Heasmans* are an exact transcript of the words of gift of the original third to them, it would be most unreasonable and almost absurd to give them a different meaning; and we agree with the Vice-Chancellor in holding that the *Heasman* moiety of that third is to be treated as added to the *Heasman* third, making a moiety of the estate which is to go all together.

Counsel will consider and mention to us again the exact alterations which will be required in the declaration and directions to give effect to the judgment.

Solicitors for the Plaintiffs and some of the Defendants: Messrs. *E. Carlton Holmes & Son.*

Solicitors for the other Defendants: Mr. *H. Sowton*; Mr. *R. Walthew*; Messrs. *Palmer, Palmer, & Bull.*

L. JJ.
1872
Jan. 30.

In re PROSPER UNITED MINING COMPANY.

Ex parte PALMER.

Cost-book System—Custom of Cornwall.

23 LD 54-5, 8

A shareholder in a Cornish mine worked on the cost-book system, relinquished his shares in July, 1868, and paid his share of the expenses up to his retirement. In August, 1869, an order for winding up the company was made, and the retired shareholder claimed to prove as a creditor for the value of his share of the stock and plant. The assets were insufficient to pay the creditors of the mine. It having been found by a jury that, according to the custom of *Cornwall*, an adventurer in a cost-book mine, upon relinquishing his shares and discharging his proportion of the liabilities of the company at that date, is entitled to be paid his share of the then value of the stock and plant, and that such share is due to him immediately, and payable within two years, the proof was admitted.

THIS case came before the Court on an appeal from the Vice-Warden of the *Stannaries* of *Cornwall*.

The *Prosper United Mine* had, up to and for many years previous to 1868, been carried on under the cost-book system. The shares were 6000, of which *J. B. Palmer*, the Appellant, held 300. On the 29th of July, 1868, a call having been made, Mr. *Palmer* sent to the purser a cheque for the amount in a letter, by which he relinquished his shares and stated his readiness to remit his proportion of further calls up to that date on being informed of the amount, and proceeded to say: "If you have agreed amount of plant, &c., with the agent of any other considerable shareholder at the present time, or are about to do so, and will inform me of the amount, it will probably do for me also without further trouble." The purser having informed Mr. *Palmer* as to the proportion of further costs, the amount was paid. The purser's clerk, on the 10th of August, sent a letter acknowledging the receipt and proceeding thus: "I have registered your resignation in the cost-book of these mines this day. Mr. *Wescomb*" (the purser) "is now at the mines, and as soon as he returns will write you upon the valuation of the plant, &c."

A valuation was made by surveyors on behalf of the purser and Mr. *Palmer*, but no payment was made to Mr. *Palmer*.

L. JJ.
1872
In re
PROSPER
UNITED
MINING
COMPANY.
Ex parte
PALMER.

On the 14th of August, 1869, a Petition was presented for winding up the company, and an order made on the 27th. Mr. *Palmer* carried in a claim under the winding-up "for my proportion of the value of the machinery and materials on the above mine at this date (the 10th of August, 1868), when my shares were relinquished as per valuation then made—£450."

The proceeds of the sale of the plant, &c., proved insufficient to satisfy the creditors of the mine. The Vice-Warden disallowed Mr. *Palmer's* claim, considering that the existence of a custom under which he could rank as a creditor in this state of circumstances had not been established, but offered to direct issues as to it. Mr. *Palmer* appealed to the Lords Justices, who took the same view as the Vice-Warden; but the Appellant desiring an issue, their Lordships discharged the order and remitted the case to the Vice-Warden to settle issues to be tried before him, the Petitioner paying the costs of the application, and the deposit being retained until further order of the Court of the Vice-Warden. The issues were settled as follows:—

1. "Whether or not it is the custom in the county of *Cornwall* that an adventurer in a company worked upon the cost-book system is entitled, upon the relinquishment of his shares therein, and upon discharging his proportion of the liabilities of the company at that date, to be paid his share of the then value of all engines, machinery, tools, tackle, materials, ores, halvans, and other appurtenances on or belonging to the mine."

2. "Whether or not, if he is entitled as aforesaid, the said share is, according to the custom, payable to him immediately upon his relinquishment, or at some subsequent period; and if the latter, at what period."

3. "Whether or not, if he is entitled as aforesaid, he is, according to the custom, entitled to be paid by contributions from the continuing adventurers after the assets have been exhausted in the payment of the debts for the time being on account of labour and materials, or only out of the residue of the assets (if any) after payment of the said debts."

The issues were tried before the Vice-Warden and a jury of the *Stannaries*, and a verdict was returned as follows: (1) As to the first issue, "It is the custom;" (2) As to the second issue, "The

L. JJ.
1872
In re PROSPER UNITED MINING COMPANY.
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amount is due immediately, and payable within two years;" (3) As to the third issue, the jury found that the first and second issues led them to the conclusion that the retiring adventurer was entitled to be paid by contributions from the continuing adventurers after the assets had been exhausted.

The Vice-Warden thereupon made an order allowing the claim; but as he considered that he had no power to give the costs of trying the issues, the appeal Petition was again placed on the Lords Justices' paper.

Mr. *Fry*, Q.C., Mr. *Graham Hastings*, and Mr. *A. Charles*, for the liquidator.

Mr. *Roxburgh*, Q.C.. Mr. *W. Barber*, and Mr. *Folkard*, for the claimant, asked for the costs of the proceedings below and the issues, and that they might be taxed by a Taxing Master of the Court of Chancery, on the ground that the Registrar of the *Stannaries* acted as liquidator and Taxing Master in the case of companies wound up in that Court.

THEIR LORDSHIPS gave the Appellant the costs he asked for, and directed them to be taxed by the Taxing Master of the Court of Chancery.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Mr. *T. S. Southgate.*

In re PATENT BREAD MACHINERY COMPANY.

Ex parte VALPY & CHAPLIN.

L. JJ.
1872
Feb. 13.

14 Eq 510, -4
2 Ch D. 34
— 346-7
3 Ch D. 67
6 Ch D 358
579 586
11 Ch D. 58
584-6-7
593-4-5-

Companies Act, 1862, *s.* 43—*Registration of Mortgage—Duty of Solicitor.*

A solicitor not usually employed by a company was employed by them to act in a particular matter, and, having required security for costs, they gave him a charge on certain debts due to them. About five weeks after this a winding-up Petition was presented, on which an order was shortly afterwards made. The charge had not been registered:—

Held (affirming the decision of the Master of the Rolls), that though under the *Companies Act*, 1862, s. 43, the want of registration did not make the charge void, yet that the solicitor could not avail himself of the charge, for that it was his duty, as being the solicitor of the company in this transaction, to see that the directions of the Legislature as to registration were obeyed.

THIS was a motion by Messrs. *Valpy & Chaplin* by way of appeal from an order of the Master of the Rolls refusing to give effect to a security claimed by them.

In the latter part of the year 1870 the company, who had not usually employed Messrs. *Valpy & Chaplin* as their solicitors, employed them about some questions which had arisen between the company and a Mr. *Stevens*. Mr. *Valpy*, agreed on behalf of his firm, to conduct the business; but, knowing that the company was not in a prosperous state, required security for costs, and a letter signed by two directors and the secretary was given him, which was as follows:—

"To *L. R. Valpy*. "*London*, 17th Nov., 1870.

"*Re Stevens*.

"We, the undersigned, as directors and secretary of the above company, hereby undertake that all sums of money expended in the above matter at our request for counsels' fees, and also all proper charges of your firm in the same, shall be a first charge on the assets of the company, to be paid out of the sums to be

[illegible] 17 WR 425 MR

L. JJ.
1872
In re PATENT BREAD MACHINERY COMPANY. *Ex parte* VALPY AND CHAPLIN.

received as per list exhibited to you, particulars of which are herewith."

At the foot was the following list:—

"*Caterham and Lewesden Asylums* . .	£110 0 0
"*Yaum and Hedley*	35 0 0
"*Strand Union*	90 10 0
	£235 10 0"

Business was done in this matter for which Messrs. *Valpy & Chaplin* claimed £90 16*s.* 2*d.*

On the 27th of December 1870, a Petition for winding up the company was presented, on which an order was subsequently made.

Messrs. *Valpy & Chaplin* gave notice of their charge to the *Strand Union* on the 16th of February, 1871, but the charge never was registered in manner required by the *Companies Act*, 1862, s. 43, no register of mortgages, it appeared, ever having been kept by the company in conformity with that section.

The *interim* liquidator having received payment of the money owing by the *Strand Union*, Messrs. *Valpy & Chaplin* took out a summons asking that it might be paid over to them. The application, having been adjourned into Court, was refused by the Master of the Rolls with costs; and from this order the present appeal was brought.

The articles empowered the directors to exercise all such powers appertaining to the company as were not, by the *Joint Stock Companies Acts* or the articles, declared to be exerciseable by the company in general meeting, and to borrow money for the purposes of the company upon mortgage of the whole, or any part, of the inventions, rights, and other property of the company.

Mr. *Wintle* for the Appellant:—

That this was a mortgage partly for future costs is not now any objection: 33 & 34 Vict. c. 28, s. 16. The directors had power to mortgage: *In re Patent File Company* (1).

The 43rd section of the *Companies Act*, 1862, is only directory,

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(1) Law Rep. 6 Ch. 83.

L. JJ.
1872

In re PATENT BREAD MACHINERY COMPANY.
Ex parte VALPY AND CHAPLIN.

and contains nothing to make a mortgage invalid if not registered: *In re Marine Mansions Company* (1).

[The LORD JUSTICE JAMES:—But the Appellant acted as solicitor of the company.]

He was not their regular solicitor; he only acted for them in this particular matter; and I submit that it cannot have been his duty to see that the charge was registered, or, at all events, within so short a time as elapsed before the winding-up.

Mr. *F. J. Wood*, for the liquidator, was not called upon.

SIR W. M. JAMES, L.J.:—

11 ChD 5

14 Eq 514

I am of opinion that the judgment of the Master of the Rolls must be affirmed. I agree with the argument for the Appellant that there was power to give such a mortgage as this, and that it is not made void by want of registration. But as it is the duty of the officers of the company to see that every charge specifically affecting property of the company is registered, I am of opinion that no director, manager, or other officer of the company, can avail himself of a charge which is not registered. Every one standing in a fiduciary position towards the company is bound to see that the company obeys the directions of the Legislature; and I am of opinion that the failure of the Appellant to do so is fatal to his case. It makes no difference that he was not the regular solicitor of the company; he acted as their solicitor in this matter; it was therefore his duty to see that, so far as this particular transaction was concerned, the register was properly kept. The judgment of the Master of the Rolls proceeds on a wholesome principle, that a solicitor, who allows the directors to omit the registration of a mortgage in respect of which he is acting for them, shall not be allowed to take the benefit of it.

6 ChD 5

Solicitors: Messrs. *Valpy & Chaplin*; Messrs. *Poole & Hughes*.

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(1) Law Rep. 4 Eq. 601.

L. JJ.
1872
March 1.

8 Ch 834
25 Ch D 127

In re EUROPEAN BANK.

MASTERS' CASE.

Company—Contributory—Boná fide Transfer—Misdescription of Transferee.

Twelve days before a banking company stopped payment, one of the shareholders in the company transferred to his son-in-law, a journeyman butcher, 280 shares, on which £15 a share had been paid, and £35 was payable, and which were then saleable at £8 to £6 a share. In the transfer deed the transferee was described as "gentleman." The transfer was duly registered by the company:—

Held, upon an application nearly five years after the transfer, to have the name of the transferor substituted for that of the transferee on the list of contributories, that, under the circumstances, the transfer was a *bonâ fide* gift to the son-in-law, that the misdescription of the transferee was not material, and that the transaction could not be disturbed.

Decision of *Malins*, V.C., reversed.

THIS was an appeal from an order made by the Vice-Chancellor *Malins*, rectifying the list of contributories to the *European Bank, Limited*, by substituting the name of *W. F. Masters* for that of *R. Deering* as the holder of 280 shares in the bank.

Masters was, in May, 1866, the registered owner of the shares in question, which were of £50 each with £15 paid up. On the 4th of May, 1866, he went to his brokers, *Carden & Co.*, one of whom, Sir *R. Carden*, was a director of the bank, and instructed them to prepare a transfer of these shares to *Deering*. The clerk of *Carden & Co.* prepared the transfer deed, in which the transferee was described as "*Robert Deering*, of 141, *Blackfriars Road, London*, Gentleman," and the consideration was stated to be 5*s*. *Masters* and *Deering* both executed the deed, which on the 7th of May was lodged with the bank, and the transfer was duly registered. The certificates of transfer were delivered by the bank to *Carden & Co.*, who gave them to *Masters*.

On the 14th of May the directors made a call of £5 per share, and on the 16th of May the bank stopped payment. An order for winding up the bank was made on the 9th of June, 1866, and the summons in this case was taken out on the 21st of March, 1871.

Masters had been a meat salesman, but had retired from business, and *Deering* had formerly been employed by him as a journeyman butcher, and while so employed in 1864 had married his daughter. At the time of the transfer *Deering* was not in regular employment, but he had earned from £1 15*s.* to £2 10*s.* a week. He was living in lodgings with his family at the address given in the transfer deed.

Masters stated in his evidence that at the time of the transfer he held shares in several other companies, and had thereby incurred heavy liabilities, and that, wishing to reduce the amount of his liabilities, he determined to get rid of his shares in the *European Bank*, and that he determined to give them to *Deering* in order to carry out a promise made at the time of *Deering's* marriage that he should have some money as a provision for himself and his family. *Masters* also stated that the shares were intended as a *bonâ fide* gift without reservation of any interest to himself, and *Deering* in his evidence stated that the transfer was absolute. It appeared, however, that when notice of a call was sent to *Deering* he took it to *Masters*, saying that he was the proper person to pay the call. It also appeared that about the 4th of June, 1866, *Masters* had, in consideration of £50, transferred to *Deering* ten shares in the *Bank of Hindustan*, and that on the 4th of October, 1866, *Deering* transferred the same shares to some one else by a transfer dated the 23rd of May, 1866, in consideration of £45. The brokers, nevertheless, sent the £45 to *Masters*, but he stated that it was sent to him by mistake, and that he paid the whole over to *Deering*.

The bank had, shortly before its stoppage, paid a dividend at the rate of 7 per cent., and there was no evidence as to the state of solvency of the bank at the time of the transfer, but there was evidence that the shares had fallen in the market, though they were saleable at from £8 to £6.

By the articles of association of the bank the company was empowered to decline to register any transfer of shares unless the transferee was approved of by the board of directors.

In the certificate relating to the shares transferred to *Deering*, which was prepared by the bank, he was described as "Gentleman;" and in the register of transfers kept by the bank, in a few cases the shareholders were described as "Gentleman," "Reverend," "Baronet," &c., but they were generally described as "Esq.," and in many pages "Esq." was put at the head of the column, and appeared to do duty for all the other names in the page.

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MASTERS' CASE.

The Vice-Chancellor *Malins* made an order that the name of *Masters* should be placed on the list of contributories in respect of these 280 shares in the place of *Deering's* name (1); and *Masters* now moved by way of appeal that this order should be discharged.

Mr. *Higgins*, Q.C., and Mr. *Bradford*, for the Appellant:—

As to the *bona fides* of the transaction, *Masters* went to his regular brokers, one of whom was actually a director of the bank, and must have known what the bank would require. It does not appear that he gave any directions as to the description of his transferee, which was put in by some one in the employment of the brokers. There is absolutely no evidence that the transaction was not a genuine transfer. The transferor and transferee both

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(1) 1871. Nov. 20. WN (1871) 207

SIR R. MALINS, V.C., after stating the facts of the case, and commenting on the evidence of *Masters* and of *Deering*, who had both made affidavits and been examined in Court, said he thought that if the transaction had been *bonâ fide*, the certificates would have been handed to *Deering*, and not to *Masters*. It was true that the same occurred in *Hakim's Case*, but there the bargain was that the transferor should hold the shares for six months, and it was therefore perfectly consistent with his case that he should receive the certificates, but here it was quite inconsistent. The Court had to exercise the functions of a jury, and His Honour thought it impossible to believe, looking at the position of the parties, that *Masters* meant to make a gift to his son-in-law of shares which were producing an income of £300 a year, and were saleable for a large sum.

As to the cases cited, they all proceeded upon one principle, at all events all those subsequent to *Costello's Case* (2 D. F. & J. 302) (1) and *De Pass's Case* (4 De G. & J. 544) (2) They all turned upon the question whether the transaction was *bonâ fide* or not, and the Court must look at all the circumstances, and arrive at the best conclusion according to the evidence. *Budd's Case* (3 D. F. & J. 297) laid the rule down correctly, that if the transfer is not absolute, but it is arranged that the transferor shall retain any benefit from the shares in case the concern should turn out profitable, he still remains liable as between himself and the other shareholders. Looking at all the circumstances, the conclusion to which his Honour was bound to arrive was, that although as between himself and the company *Masters* took this course for the purpose of divesting himself of the shares, there must have been an understanding between him and *Deering* that if the company went wrong *Deering* was to bear the brunt of it, but that if it went right *Deering* was to retransfer the shares to *Masters*.

Then as to the description given of the transferee. There, again, the circumstances must be looked at. The shares were £50 shares, upon which £15 only had been paid. Therefore £35 remained unpaid, which would leave a sum of £9800 which the transferee became liable to pay. Considering that *Masters*, according to his own statement, was making a gratuitous present of these shares to his son-in-law, it was incumbent upon him to give an accurate description of the position in life of the person to whom he was making the transfer, because if he transferred the shares to a pauper, or to a man incapable of paying the calls, and calls became necessary, as in fact happened, then, so far as the transferor could not pay, the liability fell upon the other shareholders. Knowing, as *Masters* did, the position of the transferee, he had no justification whatever for describing him as a gentleman—a term which was calculated to mislead. He ought to have put, as the

(1) S C 6 Jur N.S. 1270
(2) S C 5 Jur N.S. 1193.

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truth was, "journeyman," or "journeyman butcher," or "meat salesman," so as to have shewn on the face of the transfer that *Deering* was a man in a humble station in life. Then the directors, if they had performed their duty, would have refused to accept him. It was of the greatest importance to all companies, and especially to banks, to have a substantial body of shareholders, and if the directors in this case had known who *Deering* was, they would have said that they might be willing to have journeyman butchers, or persons of that description on the register in respect of one or two shares, but would not allow a journeyman butcher to hold 280 shares, the liability of which was close upon £10,000. The circumstance of its being a voluntary transfer made it the more incumbent on the transferor correctly to describe the transferee than it would have been if it had been a purchase for value, because if it had been a purchase for value the very circumstance of a man paying a large sum as purchase-money would shew that he was a man of substance. As the transfer was gratuitous the directors ought to have had the opportunity of knowing whether the transferee was a substantial man or not. Then it was said that the directors accepted the transferee, but his Honour agreed with Vice-Chancellor *James* in *Williams' Case* (Law Rep. 9 Eq. 225, n.) that if the directors had known the facts it would have been their duty not to have accepted the transferee, and as they did not know the facts he must attribute to them that they would have discharged their duty, and have refused to accept the transfer. His Honour must consider that the directors were imposed upon by the description, and that their acceptance of the transferee was a mere nullity, and the transfer invalid, upon the grounds stated in *Payne's Case* (Law Rep. 9 Eq. 223), and in *Williams' Case* (Law Rep. 9 Eq. 225, n.), namely, that it was the duty of the transferor duly to state the transaction. The description of "gentleman" could only be justified in a case where a man had no occupation in life, or if he was an attorney it would not be improper to describe him as a gentleman; but those who used the term in an improper manner must expose themselves to the danger of the Court holding that the whole thing was a nullity.

As to the cases, *Costello's Case* (2 D. F. & J. 302)(1) was the first, and seemed to lay down the whole principle, namely, that the transfer must not be a colourable transaction. *Lund's Case* (27 Beav. 465)(2) was an illustration of the same principle.

On the first point, therefore, His Honour came to the conclusion that this was not a *bonâ fide*, but, on the contrary, a colourable transaction, for the purpose of protecting *Masters* against liability, if that should accrue, at the same time leaving him an interest in the shares if they should turn out valuable. On that ground, therefore, His Honour would hold the transfer invalid. But there was a second ground, namely, the misdescription of the transferee. If that had not been made, His Honour must assume that this transfer would not have been permitted, and, looking at the whole transaction, therefore, he came to the conclusion that the transfer was invalid, and that *Masters'* name must be restored to the register.

(1) S.C. 6 Jur N.S. 1270
(2) S.C. 9 Jur N.S. 408

declare it was, and there is no such inherent improbability in their account as to force the Court to reject it on a mere suspicion. There is evidence that these shares were at the time saleable in the regular market for at least £6 a share, and if *Masters* had wished merely to get rid of them he could have sold them. This case is very similar to *Harrison's Case* (1), *Hakim's Case* (2), and *Bishop's Case* (3).

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(1) Law Rep. 6 Ch. 286.

(2) 1869. Nov. 12. L. J. G.

In re SMITH, KNIGHT, & Co.
HAKIM'S CASE.

Contributory—Bonâ fide Transfer.

THIS was an appeal from an order of the Master of the Rolls, who refused to put *Sutton's* name on the list of contributories in respect of certain shares in a company called *Smith, Knight, & Co.* The facts appear sufficiently from the judgment of His Lordship.

SIR G. M. GIFFARD, L.J., after stating that it was quite right to have had the case investigated, continued :—

Every one of these cases must depend very much upon its peculiar circumstances. Now I have no doubt whatever that, on the 28th of April, 1865, although Mr. *Hakim* may have been apprehensive of liability, it was his intention and object to part with these shares without retaining any interest whatever in them; and that he not only made the transfer, but made it with the object, purpose, and intent of his firm ceasing to have any property whatever in the shares. It is impossible that it should have been otherwise, when we take into consideration the fact that he made a stipulation that Mr. *Sutton* should not part with these shares for six months. Of course if that were a stipulation which was contemporaneous with the transaction, it necessarily follows that Mr. *Hakim* intended that these shares were to be Mr. *Sutton's*, to do what he liked with them. Then, as regards the certificates being given back to Mr. *Hakim*, or to the custody of his firm, that was perfectly consistent with the restriction which was put upon the transfer. Before the six months had elapsed calls had been made, and Mr. *Sutton*, not being able to pay these calls, had no object in asking for the certificates, and probably thought no more about them. The only other circumstances which appear to have been relied upon are the salary that was given to Mr. *Sutton*, and the fact that he was a clerk in Mr. *Hakim's* firm. But those circumstances are not enough to bring this case within any of the decided cases. I put my judgment upon this—I believe what Mr. *Sutton* says, and I believe what Mr. *Hakim* says, and consistently with what they have deposed to, there was, and was intended to be, a transfer of this property. That Mr. *Hakim* was, in April, apprehensive of liability, is not enough to make a transaction colourable only, or to entitle the official liquidator to have *Sutton's* name removed, and have Mr. *Hakim's* substituted in his place.

Therefore I must dismiss this appeal with costs.

(3) 1869. April 26. L. JJ.

In re FINANCIAL INSURANCE COMPANY.
BISHOP'S CASE.

Contributory—Bonâ fide Transfer—Description of Transferee—Execution of Deed—Blanks in Deed.

THE facts of this case appear sufficiently from the judgments of the Lords Justices :

SIR C. J. SELWYN, L.J. :—

This appeal motion asks that an order

Mr. *Graham Hastings* (Mr. *Glasse*, Q.C., with him), for the official liquidator :—

We say that there was an understanding between *Deering* and

of the Vice-Chancellor Sir *John Stuart*, dated the 16th of March, 1869, whereby his Honour directed the name of *Charles Bishop* the younger to be removed from the list of contributories to the *Financial Insurance Company*, in respect of twenty-five shares, should be reversed.

The company was formed in 1864. [His Lordship then stated the circumstances under which Mr. *Bishop* became the holder of twenty-five shares.] There is no evidence whatever that the company was, in 1865, in failing circumstances. However, it appears that Mr. *Bishop*, on the 28th of April, 1865, executed a deed of transfer of his twenty-five shares to a person named *John Thomas*. It is said that at the time when the deed was executed the numbers of the shares were not inserted in the deed, but Mr. *Bishop* was at this time clearly the owner of twenty-five shares, and of twenty-five shares only; and he purports to have assigned, and did by this deed assign, twenty-five shares; and though the numbers of the shares were not written in the deed until a subsequent time, still, as there was no doubt whatever, either as to the numbers of the shares which he intended to assign, or of the intention on the part of the assignee to accept the twenty-five shares, and as he had but twenty-five shares, the circumstance of the numbers being inserted afterwards is perfectly immaterial. So also is the circumstance that the deed was not actually signed by *John Thomas*, the transferee, in person. It appears that he, being present at the time of the execution of the deed, stated that he wrote very imperfectly, and requested a clerk of Mr. *Bishop's* to write his name for him, which was done accordingly. It also appears that the deed was attested by another clerk after the transaction, as is very frequently the case; but it does not appear whether the form of going over the signature again with a dry pen was gone through or not. But we find that the deed was acted upon by both parties, and by the company in which the shares were. I think, therefore, that none of the formal objections taken to this instrument can be of any avail. [His Lordship then stated the circumstances under which the registration of the transfer was delayed until the 14th of September, 1865.] We have, therefore, as I have already said, this deed, acted upon by both the parties and by the company itself, and due entry of the transfer made in the books of the company. Then it was said that the transfer was accompanied by an indemnity, which was given in respect of all the consequences of that transfer. [His Lordship then read the document relied upon as an indemnity, and came to the conclusion that the indemnity related to the costs of the transfer only.]

Then, if we suppose this deed to be altogether fraudulent and void, because this *John Thomas*, being a man of small or no means, living in a house with only £3 a year, and not filling any high position in society, was described by the very indefinite title of "gentleman," I think we should be laying down a rule which would invalidate a very large number of transfers. But the matter does not rest there, for the deed having been so completed, and the registration having taken place, it appears that a call was made in respect of these shares, and that the call was

Masters that *Deering* was only to hold the shares if the bank turned out badly. Is it credible that *Masters* meant to make his son-in-law, who was only a journeyman butcher, a present of shares

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in fact paid by the transferee. It appears also that the transferor, in December, 1865, wrote to the company, and requested that all circulars and communications relating to the shares should be sent through himself to *John Thomas*, the transferee. Also, when a dividend was declared, that dividend was made payable to *John Thomas.* The money was, however, received by Mr. *Bishop's* bankers; and inasmuch as the dividend warrant could not be paid except through the intervention of some banker, it appears to me that there is nothing unreasonable in the explanation given, that *Thomas* availed himself of the agency of Mr. *Bishop*, who had a banker, and accordingly that dividend was received by Mr. *Bishop*, not for himself, but for Mr. *John Thomas*, in whose name the warrant was made out.

Under all those circumstances, the onus of shewing some *mala fides*, or fraud, or concealment, being certainly cast upon those who seek to impugn the transaction, I entirely agree with the learned Vice-Chancellor in saying that they have failed to discharge themselves of it. They have, it is true, brought forward a number of trifling circumstances, but that which would have been the most material of all, namely, to shew that this company was at the date of this transaction in an entirely failing and insolvent condition, they have abstained from bringing forward any evidence to prove, and, in fact, there is some evidence to the contrary. I think we should be acting upon mere surmise and suspicion, and contrary to what appears from the evidence of all the parties, contrary to the acts of the company itself, and contrary to the contents of all the written documents, if we were to say that this is really such a transaction as that which took place in *Hyams' Case*, or some of the other cases. The distinction is clearly stated in the judgment in *Budd's Case*. Under those circumstances, I think the Appellant has entirely failed in establishing by his evidence such a case as is necessary in order to invalidate a transaction so acted upon by both parties and by the company. Consequently the conclusion of the Vice-Chancellor was right, and this appeal motion must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

In this case the state of circumstances was such at the date of the winding-up as to throw upon the official liquidator the whole onus of proof in order to separate *Bishop* from *Thomas*. [His Lordship stated the facts.] After the registry of the transfer Mr. *Bishop* had a right to suppose, and *Thomas* had a right to suppose, that everything requisite to be done by the company was done by them. Beyond that, the company issued a dividend warrant to *Thomas*, and treated him as their shareholder. That, therefore, is a state of things which throws on the official liquidator the onus of proving that the transaction as between Mr. *Bishop* and *Thomas* was merely colourable, and that no transfer out and out was intended; or, in other words, that although all this took place, Mr. *Bishop* was throughout the real owner of the shares. In my opinion the evidence has not proved that. I am of opinion that Mr. *Bishop* did intend to transfer the shares; that subsequently to these transactions he was not the real owner;

L. JJ.
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MASTERS' CASE.

actually worth nearly £2000, and possibly worth much more? As to the evidence, we can only get it from *Masters* and *Deering*, who, of course, are hostile witnesses. In *Lund's Case* (1), both declared that the transfer was *bonâ fide*, but their declarations were disregarded. In these cases the Court must look at the circumstances, and see whether the story is credible: *Hyam's Case* (2); *King's Case* (3).

[Sir G. Mellish:—I never could understand how the Court obtained jurisdiction in these cases. The Act of Parliament says that a man may transfer his shares, and why are we to look further? In *Ex parte Bugg* (4) the trustee alone was held liable.]

If *A.* transfers to *B.* in trust for *A.*, *A.* remains liable: *Kintrea's Case* (5); *Payne's Case* (6). No doubt you may give your shares to a beggar and so escape liability; but if the beggar is to be a trustee for you, you do not escape. The onus is on *Masters* to shew that such a transaction is *bonâ fide*, and he has not done so.

As to the description, the brokers were agents for *Masters*, and it does not signify whether he or they gave the false description. In the schedule to the *Joint Stock Companies Act* there is a column left for the description, which shews that it is necessary. The company has a right to know who is to be the new share-

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and that he had no interest beyond, possibly, a lien for his purchase-money. Indeed, if that was not so, one cannot see why such pains should have been taken to complete the transfer and get the dividend warrant issued in the name of *Thomas*. No doubt there was some informality about the transfer deed, both with respect to the number of the shares and with respect to some one else signing *Thomas's* name; but if such a deed is followed by sending a certificate of shares to the company, and is acted on by the company, and the company has all the information requisite for the purpose of enabling the company completely to register the transfer, it does not matter what the form of the original transfer may have been. As I gather from the articles, the company could not have rejected *Thomas*, because they had no power indiscriminately, or even for a reason assigned, to reject him. Nor can you infer that a man occupies any particular position because he is described as a "gentleman." For all these reasons, I am of opinion that the Vice-Chancellor came to a correct conclusion, and that this appeal motion must be dismissed with costs.

(1) 27 Beav. 465. 5 Jur. N.S. 401.
(2) 1 D. F. & J. 75. 6 Jur. N.S. 181
(3) Law Rep. 6 Ch. 196.
(4) 2 Dr. & Sm. 452. 11 Jur. N.S. 616.
(5) Law Rep. 5 Ch. 95.
(6) Law Rep. 9 Eq. 223.

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holder, and if *Masters*, intentionally or not, gave them a false description, he must take the consequences, as was held in *Payne's Case* (1).

Sir W. M. James, L.J. :—

I am sorry to differ from the conclusion to which the Vice-Chancellor has arrived, but I am of opinion that there is not sufficient evidence to fix *Masters* in the place of his son-in-law. A good deal of the argument addressed to us was, that we ought to suspect or believe several things, and that we were to assume or infer fraud from the absence of evidence. [His Lordship then commented on the evidence, and said that, in his opinion, there was nothing improbable in *Masters* having promised to do something for his son-in-law, and thinking that he might now do it. *Masters* might not have liked the risk of keeping the shares, but that might not affect the son-in-law, and *Masters* might well have meant at the same time to relieve himself and to fulfil his promise, making a present to the son-in-law if the shares became valuable. There was no evidence to shew any agreement or understanding between them, or that *Masters* could ever have recovered these shares if they had become valuable.] On the first part of the case there is not evidence to satisfy my mind that the proceeding was a sham. It is far more likely that the father-in-law meant the son-in-law to have the profit, if any, whilst the son-in-law might not have the same fear of liability.

Then, as to the misrepresentation of the rank of the transferee. He is described as residing at No. 141, *Blackfriars Road*, and is then called a "gentleman"—the vaguest of vague descriptions. The residence was within reach, and the company might, if they cared, have sent and ascertained who was this man described as living in *Blackfriars Road*. They might have known, or could easily have found out, what class of person was likely to be living there. It was a description very likely to be put in by the broker, knowing the man to be the son-in-law of *Masters*, who was possessed of considerable property. The broker was a director of the company, and must have known perfectly well that there was at that moment no immediate anticipation of any failure of the company, and that the company would not have refused to register the transfer, as any rejection of a shareholder on the ground of his not having sufficient means to pay the rest of the calls would have a very bad effect on the *Stock Exchange.*

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(1) Law Rep. 9 Eq. 223.

It would be very much too strong, after the thing has been done, and after the lapse of some years, to say that on account of such a misdescription the whole has been tainted with fraud and is void.

I believe that it was a perfectly *bonâ fide* transaction, and that no fraud upon the company was intended; and I hold that the transaction cannot be set aside.

SIR G. MELLISH, L.J.:—

I am of the same opinion. As to the transfer, the truth is stated upon it, that the consideration was nominal merely. Then the real question is, whether this was a gift, or a mere sham so that the shares remained the property of *Masters. Masters* and *Deering* both swear that the transaction is real, and though that may not be conclusive, yet, in order that we may say judicially that the statement is not true, the contrary must be brought home conclusively.

I have come to the conclusion that what they state is correct, and that their story is not improbable. [His Lordship then commented on the evidence as leading to that result.]

As to the second point, upon which more doubt might be entertained, it appears to me that there are not sufficient materials for coming to a conclusion against *Masters.*

Masters went to his broker, who was a director of the company, and it does not appear that *Masters* ever told his broker what was the actual business of his son-in-law. The broker probably did not inquire, and put down "gentleman." He may have known that it was perfectly immaterial what description was put. There is no evidence that the directors knew the company was in difficulties, and there is evidence that the shares were saleable for an amount more than enough to pay the next call which was likely to be made. Under these circumstances it does not appear reasonable to hold that such a transfer may, at any distance of time, be set aside without any proof that the misdescription was material or would have made any difference. There

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might have been evidence as to what was the practice of the company in these cases, but none has been produced.

It appears to me that there was no intention to deceive, and that the transfer ought not to be set aside.

The order of the Vice-Chancellor must be discharged, and the Appellant will have his costs below. There will be no costs of the appeal.

Solicitors for *Masters*: Messrs. *Rooks, Kenrick, & Harston.*

Solicitors for the Official Liquidator: Messrs. *Argles & Rawlins.*

L. JJ.
1872
Feb. 15.

In re WOOD.

Bankruptcy—Practice—Notice of Appeal—Bankruptcy Rules, 1870, *Rule* 144 *—Act of Bankruptcy—Fraudulent Conveyance—Bankruptcy Act*, 1869, *s.* 6.

Post 543
S.C. 29
16 Eq 403
1 Ch D 561
Ex D 62
4 Ch D 558
7 Ch D 239
18 Ch D 384/
52
23 Ch D 615
— 699

The law that a conveyance of a man's whole property to secure a past debt, whether he be a trader or a non-trader, is an act of bankruptcy, has not been altered by the *Bankruptcy Act*, 1869.

Decision of *Bacon*, C.J., reversed.

The effect of Rule 144 of the Bankruptcy Rules, 1870, which prescribes that four days' notice of an appeal shall be given, is merely that the appeal motion shall not be heard until the four days have elapsed.

Thomas Wood, a farmer, executed a bill of sale, dated the 11th of January, 1871, whereby he assigned to his brother-in-law, *S. A. Smith*, all his farming stock, crops, effects, and furniture, the consideration being expressed to be £294 paid at the time. It was, however, admitted that no money was paid at the time, and that the bill of sale was given to secure a past debt. There was some dispute as to the circumstances under which the bill of sale was given, and whether it comprised the whole of the bankrupt's property, but in the opinion of the Court all the property was in fact comprised in the bill of sale, and the bill of sale was given to secure a valid existing debt. No question of fraudulent preference was raised on this appeal.

At the time when the bill of sale was executed, the *Gloucestershire Banking Company* had recovered judgment against *Wood* for £1017; and on the 6th of February, 1871, the company, by their public officer, petitioned the County Court of *Herefordshire* that *Wood* might be adjudicated a bankrupt, one of the acts of bankruptcy alleged in the Petition being the execution of the above-mentioned bill of sale. Upon this Petition *Wood* was adjudicated bankrupt, and a trustee of the estate was appointed. The trustee moved in the County Court for an order declaring the bill of sale void. The motion was heard before the Registrar of the County Court, who made an order declaring the bill of sale void.

From this order *Smith*, the assignee under the bill of sale, appealed to the Chief Judge in Bankruptcy, who discharged the order of the County Court (1).

The trustee proceeded to appeal by giving, on the 18th of December, notice to *Smith* and his solicitor that the Court of Bankruptcy would be moved, before the Lords Justices, "on the 21st of December inst., or so soon thereafter as counsel can be heard, by &c.," that the order of the Chief Judge might be reversed or varied.

The appeal now came on for hearing.

Mr. *Little*, Q.C., and Mr. *Miller*, Q.C., for the Respondent, took a preliminary objection that the notice had been served two clear days only, whilst four days were required by Rule 144 of the Bankruptcy Rules, 1870. The Court had jurisdiction to hear appeals only under sect. 71 of the *Bankruptcy Act*, 1869, and those appeals were subject to the General Rules, and could only be

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(1) 1871. Nov. 28.

Sir J. Bacon, C.J., said that there never was a clearer case than this. It had been proved beyond doubt that the debt for which the security was given was actually due to *Smith*, and that there was a very large amount of pressure used before the security was obtained. The evidence was all one way, and His Honour was at a loss to know how the Court below could have made the order. It was quite clear there had been unfriendliness between the bankrupt and his brother-in-law, and that legal proceedings were threatened before the bankrupt would consent to execute the security. The security was therefore one which was expressly protected by the 92nd section of the Act of 1869, as having been given in good faith, and for valuable consideration. As to the security being in itself an act of bankruptcy, that was as untenable as the other proposition; and such a security by a farmer was certainly not an act of bankruptcy. His Honour had no doubt that the bill of sale was perfectly good and valid, and discharged the order made in the County Court, and ordered the costs of the proceedings in that Court to be paid by the trustee in the bankruptcy.

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heard according to those rules. There was in Bankruptcy no power, as in Chancery, to enlarge the times prescribed.

The Lords Justices considered that the motion could not have been heard on the 21st of December, but might be heard on any motion day afterwards. The object of the rule was that the Respondents should have four days in which to prepare, and here they had had, in fact, more than six weeks. Their Lordships overruled the objection.

The motion was then proceeded with.

Mr. *De Gex*, Q.C., and Mr. *Winslow*, for the Appellant:—

The Act of 1869 has made no alteration in the law as to what assignments are acts of bankruptcy (1). It is true that the words "to defeat or delay creditors" are omitted in the 2nd sub-section, which is now the law on the subject; but they were useless as regards these assignments, and were merely omitted in order to make it clearer. In the 3rd sub-section, where the intent is necessary, they are inserted. So the word fraudulent has been omitted from the 1st sub-section. Whether the bankrupt is a trader or not makes no difference. *Smith* v. *Cannan* (2) and *Young* v. *Waud* (3) shew what the law is.

Mr. *Little*, Q.C., and Mr. *Miller*, Q.C., for *Smith*:—

Under the old law the conveyance must have been with intent

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(1) 24 & 25 Vict. c. 134, s. 70: "If any person, not being a trader, shall, with intent to defeat or delay his creditors, depart this realm, or being out of this realm, shall with such intent remain abroad, or shall with such intent make any fraudulent conveyance, gift, delivery, or transfer of his real or personal estate, or any part thereof respectively, such person shall be deemed to have thereby committed an act of bankruptcy."

32 & 33 Vict. c. 71, s. 6, defines certain acts of bankruptcy to be:

1. "That the debtor has, in *England* or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."

2. "That the debtor has, in *England* or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

3. "That the debtor has, with intent to defeat or delay his creditors, done any of the following things: namely, departed out of *England*; or, being out of *England*, remained out of *England*; or, being a trader, departed from his dwelling-house; or otherwise absented himself; or begun to keep house, or suffered himself to be outlawed," &c.

(2) 2 E. & B. 35.

(3) 8 Ex. 221, 234.

17 Jan 911,

to defeat or delay creditors. This was, in 1861, extended to non-traders; but these words are omitted in the Act of 1869, and it would be very alarming if every assignment of this nature by a non-trader was void. Under the old law there could be no question; but under the new law there must be actual fraud: *Kevan* v. *Mawson* (1). A mortgage cannot defeat or delay the creditors, and there is no principle under which the decisions on this subject can be supported, and they depend entirely on the Act. There is not a single case in which an assignment by a non-trader has been held void; and the Court will not hold so unnecessarily.

SIR G. MELLISH, L.J.:—

This is an appeal from an order of the Chief Judge in Bankruptcy reversing an order of the County Court, by which it was held that a certain bill of sale is invalid as against the trustee in bankruptcy. The grounds on which the bill was held void are, first, that it was an act of bankruptcy, being an assignment of all the debtor's property to one particular creditor in consideration of a past debt; and, secondly, that it was a fraudulent preference within the 92nd section.

The Chief Judge has held the bill of sale not invalid on either of these grounds. The question as to the fraudulent preference was not raised before us, and the only question we have to determine is, whether the bill of sale was an act of bankruptcy on the ground that it was an assignment of all the debtor's property in consideration of a past debt. [His Lordship then commented on the evidence, and held it to be established or admitted that the past debt was valid, and that the assignment did comprise all the debtor's available property.] We now come to the questions of law, of which there are two: first, whether such an assignment is an act of bankruptcy in any case; and, secondly, if it is an act of bankruptcy in the case of a trader, whether it is so in the case of a non-trader.

As to the first question, we find that, in the definition of an act of bankruptcy, the words "with intent to defeat or delay his creditors" are omitted from the second sub-section of the 6th clause of the Act of 1869, the other words remaining precisely the same

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(1) 24 L. T. (N.S.) 395.

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as in the former Acts; and it was argued that the object of omitting those words was to narrow the effect of the clause, so that assignments which before that Act would have been fraudulent are no longer to be so considered. That would be a very remarkable effect as produced by omitting words which seem to have been inserted, where they are inserted, rather to narrow the meaning of the other words in the enactment.

It is, however, necessary to consider what was the effect of these words in the former Acts, and it is important to observe that, as Mr. *Winslow* pointed out, these words had in the former Acts a different interpretation as applied to different acts of bankruptcy. All were described as acts intended to defeat and delay creditors; but as to some it was necessary to prove, as a matter of fact, that the act had been done with an intent in the mind of the bankrupt to defeat or delay his creditors—as, for instance, departing the realm, or absenting himself, or keeping house. All these were in themselves innocent actions, and to make them acts of bankruptcy it was necessary to prove an intent to defeat or delay creditors. If the case was tried at law the Judge would leave to the jury, first, whether the debtor had done these acts, and secondly, whether he had done them with intent to defeat or delay his creditors. But as respects a fraudulent conveyance, gift, delivery, or transfer, the rule was quite different; for the mere act was necessarily an act of bankruptcy, and the law assumed the intent to defeat or delay the creditors as a necessary consequence of the act. There were various conveyances which the Court held to be fraudulent: a conveyance which was void under the statute of 13 Eliz. was one; so was a conveyance of a man's whole property for the benefit of all his creditors; so was a conveyance for securing a past debt; so was a voluntary conveyance in contemplation of bankruptcy. And the law assumed that such acts were of necessity done with intent to defeat or delay creditors, and such a question was never left to the jury.

It appears to me that the framers of this Act thought it would be an improvement to omit words as to intent in the cases where it was not necessary to prove such an intent, the words being then surplusage and misleading; and I think that they have been very properly left out without in any way altering the law. If we

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examine the other sub-sections we shall find that they clearly support this view. Thus in the first sub-section the words as to intent are omitted, because in the case of an assignment for creditors generally proof of the intent had never been required.

I now come to the second sub-section of the 6th clause, which speaks of a fraudulent conveyance. Now against whom must the conveyance be fraudulent? Why, clearly against creditors, because a man may make fraudulent conveyances of other kinds, as, for instance, with intent to defraud a purchaser; which it would be absurd to treat as acts of bankruptcy. The conveyance must be with intent to defraud creditors, and therefore these words are to be implied. But what is the difference between a conveyance fraudulent against creditors and a conveyance with intent to defeat or delay creditors. It really amounts to the same thing, with the exception that the intent is not a matter of fact but a conclusion of law? These first words have been left out because there is often in fact no such intent, and in order to prevent the Court and jury from being obliged to find contrary to the actual fact. The rule of law often compelled the jury to find contrary to the actual fact, and it seems quite right when a new Act is framed, to frame it so as to express what is really meant, and to avoid artificial contrivances of law. The conclusion to which I come is, that the meaning of the words "fraudulent conveyance, gift, delivery, or transfer" has not been altered, and that the words "with intent to defeat or delay," have been left out as superfluous and misleading.

23 Ch D 653

It was further argued that under the present Act positive fraud must be proved; and that the expressions in the first sub-section shew this. But I am not of that opinion. The framers of the Act probably thought it absurd to say that a conveyance of all a man's property for the equal benefit of all the creditors was fraudulent, but they seem not to have considered it absurd to say that a conveyance to one creditor for a past debt was fraudulent within the bankruptcy laws, and therefore they left these words to bear the interpretation which they have always received.

The conclusion to which I come is, therefore, that there has been no intention to alter the law on these matters. If the Legis-

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In re Wood.

lature had intended to make so serious an alteration, the intention would have been expressed in positive terms, and the Act would have declared that the conveyance of all the debtor's property to one creditor should no longer be fraudulent. They have not done that, but have used the old words "fraudulent conveyance," and those words must, in my opinion, bear their old construction. If, then, the law has not been altered, this is clearly an act of bankruptcy. Whether there is a surplus or none, the law is settled that such an assignment, though to secure a valid debt, and though by mortgage, is a fraudulent transfer, because it prevents the other creditors from issuing execution. That was held in *Smith* v. *Cannan* (1), and unless the law is altered such is still the rule.

Then comes the question whether there is any distinction between a trader and a non-trader. Now the Act does, in some cases, separate the acts of bankruptcy by traders and those by non-traders, but as to this act of bankruptcy there is no difference, and it was the same in the Act of 1861. [His Lordship referred to sect. 70]. It appears to me impossible to hold that this would not, under the Act of 1861, be an act of bankruptcy in the case of a non-trader; and the Act of 1869 simply follows the former Act, leaving out the words "with intent," &c. It appears to me quite impossible now to make any distinction in this respect between a trader and non-trader, and the assignment of all a man's property to secure a past debt is still an act of bankruptcy.

The order of the Chief Judge must be reversed, and that of the County Court affirmed. The trustee will have his costs of the hearing before the Chief Judge and in the County Court, but not those of the appeal before us.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. I will only add that I am very glad that the matter should have been so thoroughly discussed, so that we have had an opportunity of again considering *Ex parte Hawker* (2).

Solicitors for the Appellant: Messrs. *Lawrance, Plews, & Co.*

Solicitors for the Respondents: Messrs. *Courtenay & Croome.*

(1) 2 E. & B. 35. 17 Jur 911 (2) *Ante*, p. 214.

In re EAST OF ENGLAND BANKING COMPANY.

L. JJ.
1872
Feb. 16.

PEARSON'S CASE.

Winding-up—Compromise by Liquidator—Jurisdiction—Companies Act, 1862, s. 160.

The Court has no jurisdiction to order the liquidator in a winding-up to consent to a compromise with a contributory.

The decision of *Malins*, V.C., reversed.

THIS was an appeal from an order of Vice-Chancellor *Malins* made in the winding-up of the *East of England Banking Company.*

The company was being wound up voluntarily under the supervision of the Court. Miss *E. M. Pearson* was one of the contributories of the company, and her total liability amounted to £1800. A call of £300 had been previously made, which she had paid by the proceeds of the sale of some of her property. A second call had now been made for £900, which she was unable to pay. An application was made on the 12th of June, 1871, that Miss *Pearson* should be committed to prison for non-payment of the call, which was refused by the Vice-Chancellor. Miss *Pearson* then offered to pay £50 by way of compromise in full of all demands, but the liquidators refused to accept the compromise. An order was then made in Chambers that the liquidators should accept the offer, with liberty to the liquidators to move to discharge the order. They accordingly moved to discharge the order, but the Vice-Chancellor refused the application, and the liquidators appealed from this decision (1).

Miss *Pearson* had filed an affidavit stating that her only fixed income was an annuity of £60, and that she supported herself by writing. She had been engaged in the care of the sick and wounded

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(1) 1872. Jan. 31. W.N. (1872) 27

SIR R. MALINS, V.C., after shortly referring to the previous proceedings for committing Miss *Pearson* to prison, continued:—

The matter was then brought before me in Chambers. I appealed to the liquidators whether it was worth their while, considering the large amount they were dealing with, and that the insignificant pittance which this poor lady possesses would hardly make any appreciable difference to the shareholders, to pursue the matter further if I was

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in the late war between *France* and *Germany*, and was preparing a book on that subject.

Mr. *Glasse*, Q.C., and Mr. *Cozens-Hardy*, for the Appellants, submitted that the Court had no jurisdiction to make such an order on the liquidators. They referred to the *Companies Act*, 1862, s. 160 (1), and the General Order of November, 1862, rules 49 and 50. They were stopped by the Court.

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to sanction the compromise so as to relieve them from responsibility. They would not consent, and this objection was then taken, and is taken now, that the Judge having charge of the winding-up has, in fact, no control whatever over the liquidators in such a matter. I always understood that the Judge having charge of the winding-up, and being the person to exercise a discretion in the matter, ought always to be anxious to have the opinion of the liquidator, and to receive from him any information which he could supply. According to the best of my ability I have done that, and have endeavoured to apply that information so given me for the benefit of all; but I am now told that the view taken by the liquidator is to bind the Judge. The matter was brought before me upon the application of this unfortunate shareholder, who was literally and positively unable to pay anything beyond a small amount; and I, being the Judge having the charge of the winding-up of the company, came to the conclusion that it was expedient that a compromise should be made; and it certainly would be a very extraordinary thing, if the liquidator takes a harsh and unjustifiable view of the case, and opposes what I have done, that I am absolutely powerless, because the 49th and 50th Rules give the initiation of the compromise to the liquidator. No doubt, if you adhere to the strict letter of the rules, it is intended that the initiation of the compromise should be with the liquidator, and it is ordinarily so, but I observe that the 160th section of the Act does not remove the discretion of the Judge. [His Honour read the section, and continued:—] My interpretation of the Act therefore is, that although ordinarily the liquidator would be the first person to propose a compromise, yet if a contributory comes before the Judge and lays a statement before him which satisfies him that it is expedient that the compromise should be entered into, the liquidator is bound not to set at defiance the views of the Judge and to insist upon views of his own. I am quite satisfied that it is better it should be in the discretion of the Judge than in the discretion of the liquidator, whoever he may be. On the ground which I have stated, I decline to discharge the order. If the liquidators in this case think I have compromised with the lady for too small a sum, and think fit to bring the matter before me again to re-open the compromise on its merits, I shall be willing to hear them; but as to my acceding to the doctrine that I cannot sanction a compromise of this kind without the assent of the liquidators, who are my officers, I will not do so until I am absolutely bound by the decision of a superior Court.

(1) Section 160 is as follows:—"The liquidators may, with the sanction of the Court where the company is being wound up by the Court,

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Mr. *Babington*, for Miss *Pearson*, contended that it was the duty of the Court to give directions to the liquidators in all cases in which their actions were contrary to the interests of the company or oppressive to individuals. In the 160th section no distinction is made between official liquidators and liquidators in a voluntary winding-up under supervision. He referred to *In re International Contract Company* (1); *In re Contract Corporation* (2); *In re Lama Coal Company* (3); *In re London Quays and Warehouses Company* (4); *Companies Act*, 1862, ss. 138, 151.

SIR W. M. JAMES, L.J.:—

I cannot agree with the view of the Act entertained by the Vice-Chancellor. It appears clear to me that the Court has no jurisdiction, on the application of a contributory, to make an order upon a liquidator to accept a less sum than that which is due from the contributory. The duty of the Court is to determine the legal or equitable rights of the parties; but as in such a matter as the winding up of a company it may well be desirable in some cases not to press too hardly on a particular person, the Act has enabled the liquidators, with the sanction of the Court, to accept a compromise in the same way as ordinary litigants can do. But the Court has no more power to compel the liquidator to accept a compromise than to compel an ordinary suitor to take less than is due to him. I am of opinion that the only power is in the liquidator with the sanction of the Court, and that there is no

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or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities."

(1) Law Rep. 1 Ch. 523. 12 Jur N.S. 591
(2) Ibid. 2 Ch. 95.
(3) Ibid. 2 Ch. 692.
(4) Ibid. 3 Ch. 394.

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power in the Court to order a compromise, whether the liquidator recommends it or not. Of course the Vice-Chancellor has the power to withhold any order for committing this lady for non-payment of the calls. The order must be discharged.

SIR G. MELLISH, L.J. :—

I am of the same opinion. The compromise could only have been made under the 160th section of the Act, and under that section it can only be made with the consent both of the liquidator and the Court.

Solicitors: Messrs. *Sharpe, Parker, & Co.*; Mr. *Watkin*.

L. JJ.
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Feb. 16.

HADLEY *v.* McDOUGALL.

[1871 H. 103.]

Practice—Production of Documents—Joint Possession—Entries by one Partner in Partnership Books.

62 13 Eq 605
10 QBD 37 ~ 39

The sole Defendant in a suit relating to transactions in which he had been engaged with the Plaintiff, had made entries relating to these transactions in the books of a partnership firm of which he was a member:—

Held (reversing the decision of *Malins*, V.C.), that no order could be made on the Defendant to produce the partnership books without the consent of his partner.

THIS was an appeal from an order made by Vice-Chancellor *Malins* for the production of documents by the Defendant under the following circumstances:—

The bill was filed by *S. C. Hadley* for an account of partnership transactions entered into by himself and the Defendant, *J. D. McDougall*, for supplying harness to the French Government. The Defendant was in partnership with his father, *A. McDougall*, as a saddler, but his father was not interested in the transactions which formed the subject of this suit. However, it appeared that the accounts of these transactions were entered in the partnership books of the Defendant and his father.

The Defendant made an affidavit as to documents, in which he stated that he had in the joint possession of his partner and him-

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self the several documents set forth in the schedule which related to some of the matters in question in the suit, but that he was unable to produce the documents, inasmuch as his partner, who was not a party to the suit, refused to allow any of them to be produced.

The Vice-Chancellor made an order that the Defendant should produce and leave at the office of his solicitor, for inspection by the Plaintiff, the books and documents scheduled, with liberty to seal up such parts as did not relate to the matters in question in the suit. (a)

The Defendant appealed from this order.

Mr. *Glasse*, Q.C., and Mr. *W. Pearson*, for the Appellant, contended that the Court had no power to make an order for production of documents which were in the joint possession of the Defendant and a person who was not a party to the suit. They cited *Reid* v. *Langlois* (1); *Murray* v. *Walter* (2); *Taylor* v. *Rundell* (3); *Warrick* v. *Queen's College, Oxford* (4).

Mr. *Cotton*, Q.C., and Mr. *F. Harrison*, for the Plaintiff, argued that the other partner, having consented to the entries in the partnership books, could not now object to produce them. The present course was adopted to avoid the expense of setting out the accounts in the answer.

SIR W. M. JAMES, L.J. :—

It would be a serious thing to interfere with the settled rules of the Court. We cannot make an order for production of documents on a person who is not a party to the suit. The Plaintiff may, if so advised, amend the bill, so as to make the Defendant set out all the entries himself, and he can then get the production of the originals at the hearing by means of a *subpœna duces tecum*. The costs on both sides to be costs in the cause.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Harrison, Beal, & Harrison*; Mr. *Mark Shephard*.

(1) 1 Mac. & G. 627.
(2) Cr. & Ph. 114.
(3) Cr. & Ph. 104.
(4) Law Rep. 4 Eq. 254.

(a) See W N (1872) 2.

L. JJ.
1872
Feb. 29;
March 7.

8 Ch 671.
9 QB 490
[illegible] 125
10 Ch 664
10 QB. 488, 490
1 Ex D. 300, 2
3 Ch D 490
491
492
6 Ch D. 66
14 Ch D 43-5
46
— 134-6.
15 Ch D 448
451-2

Ex parte WILLIAMS. *In re* DAVIES.

Execution Creditor—Bankruptcy Act, 1869, *s.* 12*—Seizure and Sale.*

A warrant of *fi. fa.*, on a County Court judgment, was delivered to the bailiff of a County Court to be executed. Later on the same day the debtor filed a petition for liquidation, and a receiver was appointed. The bailiff, on coming to the debtor's house to execute the warrant, found the receiver in possession:—

Held (affirming the decision of the Chief Judge, who had reversed the decision of the County Court), that the trustee under the liquidation was entitled to the goods as against the execution creditor; for that under the *Bankruptcy Act*, 1869, s. 12, goods are not, as against a trustee in bankruptcy, bound by a writ of *fi. fa.* from the delivery of the writ to the sheriff; but a seizure of them before the act of bankruptcy is necessary.

THIS was an appeal by an execution creditor from an order of the Chief Judge in Bankruptcy, discharging an order of the County Court of *Monmouthshire.*

On the 3rd of November, 1871, *Williams* recovered judgment against *Davies,* a trader, in two actions, in the County Court of *Chester*, for £17 1*s.* 2*d.* and £9 17*s.* 6*d.*, and caused warrants of *fi. fa.* to be issued. On Saturday, the 4th of November, the under-bailiff of the *Chester* County Court forwarded the warrants by post to the Registrar of the County Court of *Monmouth,* the debtor being resident in *Monmouthshire.* The Registrar of the *Monmouth* Court re-issued them, and on the 7th of November, at half-past eleven in the morning, gave them to the sub-bailiff of that Court to be executed.

On the same 7th of November, but later in the day, *Davies* filed in the *Monmouth* County Court a petition for liquidation, and on the same day a receiver was appointed, who immediately entered into possession of the goods in *Davies*' house.

On the afternoon of the 7th of November the assistant-bailiff, who went to execute the warrants, found the house of *Davies* closed, and could not obtain admittance. He waited at a public-house opposite, and in about twenty minutes, seeing *Davies*' door open, he went in and found the receiver there. He nevertheless made inventories of the goods, and remained in possession.

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On the same day an injunction was obtained to restrain *Williams* from taking any further proceedings on his judgments. *Williams* had no notice of this order till the 9th of November.

On the 27th of November the Registrar of the *Monmouth* County Court, sitting for the Judge, dissolved the injunction, and ordered that the bailiff should be at liberty to realize by sale the goods seized by him under the executions. The trustee under the liquidation appealed from this order, and on the 18th of December the Chief Judge discharged it. From this order of the Chief Judge *Williams* now appealed.

The Hon. *A. Thesiger*, and Mr. *Finlay Knight*, for the Appellant:—

This case stands on the same footing as if the judgment were from a superior Court: 19 & 20 Vict. c. 108, s. 47. We contend that the goods of a judgment debtor are bound from the delivery of the writ to the sheriff, and that seizure makes no difference. Seizure does not take the property out of the debtor: *Giles* v. *Grover* (1). Under the Bankruptcy Acts in force before the Act of 1849, seizure, and after that Act seizure and sale, were necessary to defeat the right of the assignee; but the late Act has altered the law: *Ex parte Rocke* (2); *Slater* v. *Pinder* (3). Under 13 Eliz. s. 7, the title of the assignee related to the act of bankruptcy, but it was held that the execution creditor would prevail unless the act of bankruptry was before the *teste* of the writ. The statute 21 Jac. 1, c. 19, s. 9, first made seizure necessary as against the assignee in bankruptcy; and the Act of 1849, sect. 184, made seizure and sale necessary; but those enactments are repealed, and not re-enacted. The statute 19 & 20 Vict. c. 97, s. 1, does not apply. So the case now stands on the *Statute of Frauds*, by which goods are bound, not as at common law, from the *teste* of the writ, but from its delivery to the sheriff, and seizure is immaterial: *Payne* v. *Drewe* (4); *Hutchinson* v. *Johnstone* (5); *Woodland* v. *Fuller* (6); *Hobson* v. *Thelluson* (7); *Boyle* v. *Blackstock* (8).

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(1) 9 Bing. 128.
(2) Law Rep. 6 Ch. 795.
(3) Ibid. 6 Ex. 228.
(4) 4 East, 523.
(5) 1 T. R. 729.
(6) 11 A. & E. 859.
(7) Law Rep. 2 Q. B. 642.
(8) 8 L. T. (N.S.) 641.

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Mr. *De Gex*, Q.C., and Mr. *Bagley*, *contrà*:—

It was never intended to take this retrograde step by the Act of 1869. By sect. 12 no creditor is to have any remedy against the person or property of the bankrupt, except the ordinary remedies of a creditor in bankruptcy, unless he holds security. A writ under which no seizure has been made is not security: sect. 16. It binds no particular goods; a bill would not lie to have it declared a charge, and its value cannot be ascertained so as to enable the creditor to deduct it. It is nothing but a general right to seize goods, which is not in the nature of a security.

Mr. *Finlay Knight*, in reply.

SIR G. MELLISH, L.J.:—

The question in this case is whether an execution creditor who has obtained a judgment in a County Court under which a warrant was issued to the bailiff of the County Court enabling him to seize the goods of the debtor, which warrant was placed in the hands of the bailiff before any proceedings in bankruptcy, has a better title to the goods than the trustee under a petition for liquidation by arrangement which was filed on the same day, but later in the day. It is admitted that a creditor under a County Court execution cannot have, at all events, any greater rights than under an execution issued by one of the superior Courts at *Westminster*. The general question therefore arises, whether, if a *fi. fa.* is delivered to the sheriff, so that the goods are bound within the *Statute of Frauds*, the creditor is entitled to the goods as against the trustee under a bankruptcy not having relation to any act of bankruptcy prior to the delivery of the writ to the sheriff. This depends on sect. 12 of the *Bankruptcy Act*, 1869. It is clear that the case falls within the first part of that clause, for proceeding to seize goods is certainly enforcing a remedy against the property of the debtor, and the question then is whether it comes within the proviso. Now, it was decided by the full Court of Appeal in *Ex parte Rocke* (1), and by the Court of Exchequer in *Slater* v. *Pinder* (2), that where an execution creditor has seized the goods of a debtor before the commission of an act of bankruptcy, he is entitled to

(1) Law Rep. 6 Ch. 795.

(2) Law Rep. 6 Ex. 228.

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the goods as against the trustee; and Mr. *Thesiger* argued that the seizure made no difference, for that the general property in the goods is not taken out of the debtor until sale, but that the creditor has a security on the goods from the time of the delivery of the writ to the sheriff. It is necessary, therefore, to consider what is the effect of seizure. Now, at common law the goods were said to be bound from the *teste* of the writ, for the goods which the debtor then had were what the sheriff was ordered to seize, and consequently no dealing with them by the debtor could take away the sheriff's right to seize them if he could find them within his bailiwick. The *Statute of Frauds* altered this by carrying the time down to the delivery of the writ to the sheriff, but that was only as between the creditor and third parties, for there are cases to shew that as against the debtor himself the goods were still bound from the *teste* of the writ. This difference is only important where the debtor dies before the writ is delivered to the sheriff, in which case the sheriff can seize in the hands of his executors all goods which belonged to him at the *teste* of the writ; but as against all third parties, the sheriff can only seize what belonged to the debtor when the writ was delivered to him. Still the sheriff had no property in the goods till seized. The debtor may remove them into another bailiwick; that is not illegal, for the sheriff has no property in the goods, he has only a right to seize them; but after he has seized them he has a special property in them: *Wilbraham* v. *Snow* (1); so that he can maintain trover for them, as is said in the note there to have been decided in *Clerk* v. *Withers*, on the ground that the sheriff, having once seized the goods, was liable for their full value. Another effect of seizure is this: there may be a number of writs issued into different counties, and when goods are seized under one of them, until it is known how much is seized no other can be executed. The effect of seizure, therefore, is, that upon seizure the sheriff ceases to have merely a right to seize, and acquires a qualified property in the goods like that of a factor who is under advances, and from whom the goods may be claimed back on payment of those advances. This qualified property differs from a mortgage, inasmuch as at law the mortgagee has an absolute title to the property, and the title of the

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(1) 2 Wms. Saund. 47, a, Ed. 1845.

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Ex parte WILLIAMS. *In re* DAVIES.

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debtor is only in equity; but in this case there is at law a qualified property with a power of sale. The Court of Exchequer held, in *Slater* v. *Pinder* (1), that when the goods have been seized by the sheriff, the creditor has a security upon them. Are we to hold that he has a security upon them before they are seized? To hold so would not do much violence to the words, but to ascertain the intentions of the Legislature, let us look at the course of legislation on the subject. Until the statute of Jac. 1, the goods might be seized if there was no act of bankruptcy before the *teste* of the writ, but by that statute the assignee was to take, unless they had been seized before an act of bankruptcy; and so matters went on till the Bankruptcy Act of 1849, which made an execution void as against the assignee unless levied by seizure and sale. The law, then, having for so long a period been that seizure was necessary, and then having been altered so as to make sale as well as seizure necessary, it is not likely that the Legislature intended to make such a change as that delivery of the writ to the sheriff should be enough. And I think that if we take the literal meaning of the words used, the Legislature has not said it. A mere right to seize property cannot properly be called a security; and I think that the proviso only applies to cases where the creditor has the absolute property or a special property in goods, not a mere right to seize them. The result is, that the trustee is entitled, and the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Doyle & Edwards*; Messrs. *Stocken & Jupp*.

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(1) Law Rep. 6 Ex. 228.

Ex parte WIER. *In re* WIER.

L. JJ.
1872
March 14.

Debtor Summons—Bankruptcy Act, 1869, *s.* 7—*Security.*

Where a person served with a debtor summons disputes the debt, the Court, in determining whether the alleged debtor must give security under the *Bankruptcy Act*, 1869, *s.* 7, will have regard not only to the state of the debtor's pecuniary circumstances, but to the probability of the claimant being able to establish the debt.

In a case, therefore, where it appeared extremely doubtful whether the claim could be substantiated at law, the Court of appeal discharged an order directing the debtor to give security, though it was admitted that he was in very poor circumstances.

9 Ch 326
5 Ch D 87
20 Ch D 356
362
22 Ch D 31

THIS was an appeal by *Wier* from so much of an order of Mr. Registrar *Pepys*, sitting for the Chief Judge, as directed that *Wier*, upon whom *Tucker* had served a debtor summons, should within fourteen days enter into a bond with sureties in the penal sum of £858 14*s.* 4*d.* to pay to *Tucker* such sum as might be found due in the Chancery suit of *Wier* v. *Tucker*, together with such costs as might be given by the Court of Chancery to *Tucker;* and also, in the event of the bill being dismissed, to pay to *Tucker* £429 7*s.* 2*d.*, together with such costs as should be given by the Court of Chancery.

The order went on to direct, that upon such bond being given all proceedings on the summons should be stayed until the Court of Chancery had come to a decision in the suit.

In 1867 *Wier* and *Tucker* had entered into partnership for the purpose of working certain patents, under the firm of "*Wier & Co.*" In 1869 arrangements were entered into for making over the whole concern to a limited company to be called "*Wier & Company, Limited.*" This company was duly registered, and the business was made over to it.

In August, 1869, *Wier* gave to *Tucker* two bills of exchange for £300 and £120, drawn upon "*Wier & Company*," and accepted by *Wier* in the name of "*Wier & Company.*"

On the 6th of July, 1870, *Tucker* served *Wier* with a debtor summons for £429 7*s.* 2*d.*, the amount due on the bills. On the 5th of August, 1870, an order was made on the summons for *Wier*

L. JJ.
1872
Ex parte WIER.
In re WIER.

to give, within seven days, security for such sums as *Tucker* might recover in an action; and by a subsequent order the time was extended to the 19th of August, 1870. On the 29th of August *Tucker* commenced an action against *Wier* on the bills; and on the 16th of February, 1871, filed a petition for adjudication in bankruptcy against him, on the ground of his having failed to give security, as required by the order of the 5th of August, 1870.

On the 21st of March, 1871, *Wier* filed his bill in Chancery against *Tucker* for an account of the partnership transactions, and to restrain the actions on the bills of exchange and the proceedings in bankruptcy, and obtained an injunction, which, however, on the 24th of March, was dissolved by the Lords Justices.

On the 24th of March, 1871, the Registrar adjudicated *Wier* a bankrupt; but this order was discharged by the Lords Justices on the 3rd of August, 1871, on the ground that there had been no act of bankruptcy within six months (1).

In December, 1871, *Tucker* put in his answer, by which he set up the case that the account between him and *Wier* had been finally settled, and that the bills of exchange were for the balance found due to *Tucker* on such accounts. He stated, further, that it had been arranged that *Wier* should procure the acceptance of the bills by *Wier & Co., Limited*, and that he received them from *Wier* in the belief that they had been so accepted.

No further proceedings were taken in the action; but towards the end of 1871 *Tucker* served *Wier* with another debtor summons, claiming the sum of £429 7*s.* 2*d.*, "for principal, interest, and noting due on two bills of exchange, dated respectively the 5th and 10th of August, 1869, for £300 and £120 respectively, payable three months after date; both of which bills of exchange were drawn by the said *John Tucker* upon and accepted by *Wier & Co.*, the consideration for such bills being money lent and advanced by the said *J. Tucker* to you the said *A. M. Wier*, then trading under the firm of *Wier & Co.*, and interest on such moneys so advanced; also the balance due to the said *J. Tucker* on an account rendered to the said *J. Tucker* by the said *A. M. Wier*, and stated between you." On an application to discharge this summons, Mr. Registrar *Pepys*, on the 13th of February, 1872, made the order, the effect of which is given above. *Wier* admitted that his circumstances were very embarrassed, and were such that he could not expect to find the sureties.

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(1) Law Rep. 6 Ch. 875.

Mr. *Bagley*, and Mr. *Cracknall*, for the appeal:—

We submit that the making the security include the costs of the Chancery suit is clearly wrong, the Act only contemplating the costs of a proceeding at law by the alleged creditor to establish his debt. But we say that, in the circumstances of the case, security ought not to have been ordered at all. It was decided by the Court of appeal in *Ex parte Wood* (1) that, under the Act of 1849, it was not imperative to require security, but that all the circumstances of the case, including the probability of success in the action, must be looked to. This is, *à fortiori*, the case under the Act of 1869, sect. 7, the terms of which are less imperative than those of the former Act. Here, having regard to what *Tucker* himself says as to the giving the bills of exchange, the prospect of success in an action upon them is almost hopeless.

Mr. *Cookson*, for *Tucker* :—

The Chancery suit is needless.

[The LORD JUSTICE MELLISH :—It has been pending nearly a year, and ought it now to be interrupted by a debtor summons ?]

That depends on the merits. There is evidence that the accounts were finally settled and a balance ascertained, for which an action at law would lie.

[The LORD JUSTICE JAMES :—Very strong evidence would be required to make such an action maintainable. *Primâ facie*, it would be a case for a bill for an account.

The LORD JUSTICE MELLISH :—Very strong evidence of a settlement of accounts from which a promise to pay a definite balance could be inferred, would be necessary.]

At all events, there is a debt on the balance of the partnership accounts which constitutes a good equitable debt.

[The LORD JUSTICE JAMES :—Your summons is based only on the bills of exchange.]

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(1) 4 D. M. & G. 875.

L. JJ.
1872
Ex parte WIER.
In re WIER.

It refers also to the account stated. Security was rightly ordered, the debtor being insolvent.

SIR W. M. JAMES, L.J. :—

I am of opinion that the order cannot be sustained. The Registrar ought to have had regard not merely to *Wier's* solvency, but to the prospect of *Tucker's* success in an action. The summons is founded on two bills of exchange given to secure the balance of an account stated. That is mentioned as the consideration for the bills; but the summons is founded solely on the bills, which are stated in it to have been accepted by *Wier*. On *Tucker's* own shewing, however, the acceptance was intended to be on behalf of *Wier & Co., Limited*, and so could not render *Wier* liable to be sued on the bills. I am of opinion, therefore, that there was no prospect of *Tucker's* succeding at law, and that the Appellant is right in what he asks.

SIR G. MELLISH, L.J. :—

20 ChD 362

I am of the same opinion. In determining whether security should be given, the Registrar ought not only to consider the solvency of the alleged debtor, but also what is the probability that the claimant will be able to establish a debt. If the probability is that there is a good defence, security ought not to be required. Here it is, at least, very doubtful whether an action could be maintained. The bills were accepted in the name of "*Wier & Co.*" *Tucker* himself says that this did not mean *Wier* alone, or *Wier & Tucker*, but *Wier & Co., Limited*. An acceptance by *Wier & Co., Limited*, is not expressed, and an acceptance by *Wier* alone, or by *Wier* and *Tucker*, was not intended; and it is very doubtful whether an action on the bills can be maintained.

Solicitors: Mr. *W. Foster;* Mr. *Augustus Beddall.*

In re BROADWOOD'S SETTLED ESTATES.

L. JJ.
1872
March 14.

Settled Estates Act, 19 & 20 *Vict. c.* 120, *s.* 37—*Married Woman—Infant—Consent.*

For the purposes of the *Settled Estates Act* a married woman who is under age is in the same position as if she were of full age, and must be examined under sect. 37. It is not sufficient for her to concur in the Petition as an infant by a special guardian.

IN this case a Petition was presented under the *Settled Estates Act,* to effectuate a sale to *Thomas Broadwood* of an undivided moiety of an estate, he having offered £13,748.

Several of the Petitioners were infants, and petitioned by *R. G. Davey,* their special guardian. One of these infants was a married woman, who was a tenant in tail, and on the hearing of the Petition the question was raised whether it was not necessary for her to be examined as a married woman. The Master of the Rolls was of opinion that it was not, and made the order for sale. Subsequently, before the order was drawn up, the attention of the Court was called by the counsel for the purchaser to the 37th section of the Act. His Lordship adhered to the opinion he had already expressed, that it was not necessary that an infant married woman should be examined, but gave leave to mention the point to the Lords Justices.

Mr. *Martineau,* for the purchaser, mentioned the case to the Court, and referred to the *Settled Estates Act,* 19 & 20 Vict. c. 120, ss. 17, 36, 37, 38, 39. He submitted that the Act intended to put a married woman who was under age on the same footing as any other married woman for the purposes of the Act.

Mr. *Montague Cookson,* for the Petitioners.

THEIR LORDSHIPS were of opinion that, under sect. 37, a married woman who was a minor, was, for the purposes of the Act, in the same position as a married woman of full age, and that her consent must be taken by examination in the same way as if she was of full age.

Solicitors: Mr. *T. K. Edwards;* Messrs. *Mercer & Mercer.*

L. JJ.
1872
March 7.

Ex parte MARSHALL. *In re* WADDINGTON.

Company—Winding-up—Bankrupt Contributory—Companies Act, 1862, *ss.*75, 77.

A contributory in a mining company became bankrupt, and obtained his order of discharge. Nearly two years afterwards a call was made under the winding-up:—

Held (affirming the decision of the Registrar), that the contributory was released by the order of discharge from all liability to the call.

WADDINGTON was a shareholder in the *Wendron Consols Mining Company* in *Cornwall.* In November, 1866, an order was made for winding up this company, and *Waddington* was put on the list of contributories. In December, 1868, *Waddington* was adjudicated bankrupt, and entered the company as a creditor in the statement of his affairs. In February, 1869, he obtained his order of discharge. In November, 1870, a call of £14 5*s.* per share was made on the contributories. The amount of this call on *Waddington's* shares was £156 15*s.* *Waddington,* on being applied to, refused to pay, alleging that his bankruptcy discharged him. The Registrar of the Stannaries, in the character of liquidator of the company, thereupon took out a debtor summons against him, and this summons having been dismissed by Mr. Registrar *Brougham,* the present appeal was brought.

Mr. *De Gex,* Q.C., and Mr. *Bagley,* for the Appellant, contended that the liability of the shareholder was utterly incapable of valuation, and, therefore, could not be proveable in bankruptcy, nor barred by the order of discharge.

[They referred to the *Companies Act,* 1862, ss. 75, 77, *Hastie's Case* (1), and *McEwen's Case* (2)].

Mr. *Roxburgh,* Q.C., and Mr. *Doria, contrà,* were not called upon.

Sir W. M. James, L.J.:—

There is some force in the argument for the Appellant, but the words of the Act are too strong for him.

(1) Law Rep. 4 Ch. 274.

(2) Law Rep. 6 Ch. 582.

L. JJ.
1872
Ex parte MARSHALL.
In re WADDINGTON.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The case is governed by the principle of *McEwen's Case.*

Solicitors: Mr. *Stacpoole;* Messrs. *Le Riche, & Son.*

Ex parte RAYNER. *In re* JOHNSON.

L. JJ.
1872
March 7.

Bankruptcy—Trader—Execution for more than £50—Petition for Liquidation after Seizure and before Sale—Bankruptcy Act, 1869, s. 87.

The goods of a trader having been taken in execution for a debt exceeding £50, he on the following day presented a petition for liquidation by arrangement, under which resolutions for liquidation were come to and a trustee appointed. The execution creditor claimed the benefit of his execution, on the ground that the seizure alone was not an act of bankruptcy, and that no sale had taken place when the petition was presented:—

Held (affirming the decision of the Chief Judge), that the trustee was entitled to the goods.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 13th of October, 1871, the Sheriff of *Chester* took possession of certain goods of *Thomas Johnson*, under a *fi. fa.* issued against him for £819, on a judgment obtained against him by *Rayner* and *Andrewe*, in an action against him and *John Johnson*.

On the 14th of October *T. Johnson*, who was a trader, presented a petition for liquidation by arrangement. On the same day *Bewley* was appointed receiver, and on the following day took possession of *T. Johnson's* house, and of the goods in question. On the 17th of October the sheriff was served with an order that *Rayner* and *Andrewe* should on the 23rd shew cause why they should not be restrained from all further proceedings, and in the meantime restraining them and the sheriff from selling. The sheriff thereupon withdrew from possession. On the 19th of October *T. Johnson* and his partner, *J. Johnson*, presented a petition for liquidation of their affairs by arrangement, and on the same day *Bewley* was appointed receiver of the property of both. On the 20th of October *Rayner* and *Andrewe* consented to the con-

Post 521,
8 Ch 671
9 Ch 302
17 Eq 453
9 Ch 435,
9 Ex 140
10 Ch 381
1 Ch D 17
1 Ex D 14
2 C P D 40
15 Ch D 44
452-3-
16 Ch D 33
17 Ch D 66
11 Q B D 4

L. JJ.
1872
Ex parte RAYNER.
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tinuance of the injunction till after the first meeting of creditors. On the 7th of November meetings were held both of the joint and several creditors of *Thomas* and *John Johnson*, and resolutions for liquidation by arrangement were come to. On the 16th of November, *Rayner* and *Andrewe* not having received notice of any extension of the injunction, the sheriff again took possession of the goods under the same writ as before. On the 29th of November the Judge of the *Liverpool* County Court made an order restraining *Rayner* and *Andrewe* from all further proceedings, and ordering them and the sheriff to give up possession of the goods. An appeal from this order having been dismissed by the Chief Judge(a), the present appeal was brought.

Mr. *De Gex*, Q.C., and Mr. *Cohen*, for the Appellants:—

By the Act of 1869, s. 6, seizure and sale of the debtor's goods constitute an act of bankruptcy. But apart from that, they give the execution creditor a good title. Here the act of bankruptcy was not complete when the resolutions were come to, which were founded on an earlier act of bankruptcy—the petition for liquidation. Now if a creditor founds his proceedings on an earlier act of bankruptcy, he cannot treat a later act as void, because bankruptcy proceedings might have been founded on it: *Jones* v. *Harber* (1).

[The LORD JUSTICE MELLISH referred to 24 & 25 Vict. c. 134, s. 73, making the act of bankruptcy date from the seizure.]

That is not re-enacted, which shews a change of intention. The act of bankruptcy dates from the sale: *Higgins* v. *McAdam* (2).

[The LORD JUSTICE MELLISH referred to *King* v. *Leith* (3).]

Sect. 11 of the Act supports our view.

Mr. *Little*, Q.C., and Mr. *W. Potter*, *contrà*, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that this case is concluded, as the Chief Judge thought, by the words of the 87th section, "Where the goods of

(1) Law Rep. 6 Q. B. 77.
(2) 3 Y. & J. 1.
(3) 2 T. R. 141.

(a) See WN 1872/140.

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any trader have been taken in execution in respect of a judgment for a sum exceeding £50 and sold, the sheriff, or in the case of a sale under the direction of the County Court, the high bailiff, or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and, upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale after deducting expenses on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high-bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

It seems to me to have been the plain intention of the Legislature, that the seizure of a trader's goods, and the sale of them, was not to vest in the execution creditor any title to the proceeds; for if the sheriff gets notice of a petition within fourteen days after a sale, and the debtor becomes bankrupt, he is to pay the money over to the trustee. That is the legislative declaration of the title of the trustee to the proceeds of the goods, even if they are sold before the adjudication, and *à fortiori*, as it seems to me, it is a declaration of the title of the trustee to the goods between the time of the seizure and the sale. I think it is quite inconsistent with the whole scope of the Act of Parliament, and quite contrary to common sense, to hold that a seizure and sale, being an act of bankruptcy, the person who has seized and sold can recover the proceeds when the other creditors present the petition before the sale, though he could not hold them if the creditors waited until the sale had been completed to present their petition. That would be a most unreasonable view to take of the meaning of the Legislature. The Chief Judge has thought that the meaning of the Legislature was to make such a transfer to the execution creditor void, and that being so the trustee (his title being completed by an adjudication before sale made), being then the real owner of the proceeds of the goods, is in a position to say, Do not sell the

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goods, but let me take them for the purpose of making the most of them for the benefit of the estate.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *Thomas;* Messrs. *Neal & Philpot.*

TURNER *v.* COLLINS.

[1869 T. 31.]

L. C.
1871
Dec. 6, 7, 8, 12, 22.

Setting aside Deed of Gift—Knowledge—Undue Influence—Delay—Part of Deed.

16 Eq 54,
10 Ch 19
7 Ch D 64,

In order to maintain a voluntary deed of gift from a son for the benefit of a father, it must be shewn both that the son understood the contents of the deed and that he was not under undue parental influence.

A voluntary deed of gift cannot, after unreasonable delay, be set aside, though the gift was of a reversion and remained a reversion.

Part of a voluntary settlement may be set aside.

Under a marriage settlement, the son of the marriage was entitled to the reversion expectant on the life estate of the father in two sums of money, one of which had come from the father's side, the other from the mother's side. The son had also a large income under the will of his grandfather, and would have a much larger income on attaining the age of twenty-five years. The son had lately attained the age of twenty-one years, and was residing with his father. The son, without employing a separate solicitor, executed a deed giving to his father's second wife and her daughter the reversion in both the sums which were included in the marriage settlement, and giving to the father power to appoint the sum which came from the mother's side to any third wife and her children. The son left the father's house five years after the execution of the deed, and employed a separate solicitor two years afterwards, when the subject of setting aside the deeds was mentioned. Seven years afterwards the son filed a bill to set aside so much of the deed as related to the sum which had come from the mother's side:—

Held, on the facts of the case, that though the son understood all the contents of the deed except the power to appoint to a third wife and her children, he was not sufficiently protected from parental influence, and that if the bill had been filed at an earlier time the deed must have been set aside to the extent prayed, but

Held, that, as the filing of the bill had been so long deferred, the deed must be rectified only by striking out the power.

Decree of *Malins*, V.C., varied.

By a settlement dated the 9th of August, 1832 (made in pursuance of articles executed on the marriage of *J. T. B. Phillipson* with *Georgiana Jane Turner*), a sum of £13,333 Consols was placed in settlement by the mother of *J. T. B. Phillipson*, and a sum of £6591 Reduced by *J. T. B. Phillipson* himself, in trust for *J. T. B. Phillipson* for his life (under certain restrictions), and after his death for the wife for her life, and after the death of the survivor for the children or remoter issue of the marriage, as the husband and wife or the survivor should appoint, and in default of appointment for such of the children of the marriage as, being sons, should attain the age of twenty-one years, or, being daughters, should marry or attain that age. A sum of £13,333 Consols was also placed in settlement by *John Turner*, the father of the wife, upon trust for the wife during her life, and after her death for *J. T. B. Phillipson* for life, and after the death of the survivor for the children or remoter issue of the marriage, as the husband and wife or the survivor should appoint, and in default of appointment for the children of the marriage as declared as to the other trust funds.

There was issue of the marriage one child only, *John Turner Phillipson*, who afterwards took the name of *Turner*. Mrs. *Phillipson*, the wife, died in the year 1834.

Mr. *Turner*, the father of Mrs. *Phillipson*, died in 1851, leaving by his will £1200 a year to *J. T. Turner* (the son of *J. T. B. Phillipson*) until he attained the age of twenty-five years, and a further income of £1000 a year if he married. On attaining the age of twenty-five years he was to receive a legacy of £5000, and another legacy of £5000 if the trustees of the will should think fit to give it; and he was then to receive for life the whole income of the estate of the testator, amounting to £6000 or £7000 a year, with remainder to his issue in strict settlement. He had power to give to his widow £500 a year, and portions of £10,000 or £5000 to his younger children, according to their number and according to whether they were sons or daughters.

J. T. Turner attained the age of twenty-one years on the 2nd of May, 1854.

The father, *J. T. B. Phillipson*, had, in 1849, married a second wife, by whom he had one child, a daughter, *Constance Phillipson*, and the whole family lived in a house called *Bramshaw Hill*, near *Lyndhurst*, which had been purchased with part of the money brought into settlement by the mother of *J. T. B. Phillipson*.

By an indenture dated the 8th of June, 1854, and made between *J. T. B. Phillipson*, of the one part, and *J. T. Turner*, of the other part, *J. T. B. Phillipson* released all the funds comprised in the settlement of 1832 from his power of appointing to remoter issue (the effect of which was to vest the whole of the settled fund in

J. T. B. Phillipson for life, with remainder to *J. T. Turner*); and *J. T. Turner* released to *J. T. B. Phillipson* a sum of £700 which had been advanced to him by the trustees of the settlement. In November, 1854, £4079 Consols was transferred by the trustees of the settlement to *J. T. B. Phillipson* and *J. T. Turner*. This money appeared to have been principally applied in payment of the debts of *J. T. Turner*, and the rest in payment of debts of *J. T. B. Phillipson*. The result of these transactions was that there remained in the hands of the trustees of the settlement, first, the *Bramshaw Hill* estate and the £6519 Reduced, which together represented the sum of money brought into settlement by *J. T. B. Phillipson* and his mother (except the parts which had been received by *J. T. B. Phillipson* and *J. T. Turner*); and secondly, the sum of £13,333 Consols brought in by Mr. *Turner*.

Early in 1853 one of the trustees of the settlement represented to *J. T. Turner* that his father felt aggrieved by the settlement made on his marriage, inasmuch as his second wife and child would be unprovided for. The solicitor of the father was then consulted, and *J. T. Turner* expressed his intention of making a settlement on his step-mother and half-sister. Soon after he came of age the solicitors of the father were again consulted; several interviews and some correspondence took place, and finally the deed of the 15th of March, 1855, in question in this suit was executed. The son had no separate solicitor; but a barrister, who was a friend of all parties, acting on behalf of the son, approved of a draft settlement with some reservations. The barrister was, however, as the Lord Chancellor considered, not informed of all the facts. He was also displeased at a letter which had been written by the son in answer to suggestions as to the son's marriage settlement, and had nothing further to do with the business. The other circumstances under which the deed in question was executed appear sufficiently for the purposes of this report in the judgment of the Lord Chancellor.

The deed of the 15th of March, 1855, was made between *J. T. B. Phillipson*, of the first part, *J. T. Turner*, of the second part, and *C. G. R. Collins*, *W. A. Lethbridge*, and *W. E. Hilliard*, of the third part. By it, after reciting, amongst other things, that *J. T. Turner* was desirous and had agreed to release and give up to *J. T. B. Phillipson* all the reversionary interest of *J. T. Turner* in the *Bramshaw Hill* estate, in £6000 Reduced, part of the £6519 Reduced, and in the £13,333 Consols, upon condition that *J. T. B. Phillipson* should settle the same as therein mentioned, it was witnessed that in order to effectuate his desire, and in consequence of the settlement thereinafter made by *J. T. B. Phillipson*, and for divers other good causes, him, the said *J. T. Turner* thereunto moving, he, the said *J. T. Turner*, assigned to *J. T. B. Phillipson* the reversionary interest of *J. T. Turner* in the premises. And it was witnessed that *J. T. B. Phillipson* did declare that the trustees, *Collins*, *Lethbridge*, and *Hilliard*, should hold the premises upon trusts for investment as therein mentioned, and should pay the annual income to *J. T. B. Phillipson* during his life, and after his death to his wife, *Caroline Phillipson*; and after the death of both to their daughter, *Constance Phillipson*, for her life; and after her death should hold the principal in trust for *J. T. Turner*, his executors, administrators, and assigns. The deed contained a further provision that if *Caroline Phillipson* should die, and *J. T. B. Phillipson* should marry again, then it should be lawful for him to revoke the trusts of the £13,333 Consols, and to appoint as he should think fit for the benefit of his then intended wife, or the children of his then intended marriage. And the deed contained a power to *J. T. B. Phillipson* and *J. T. Turner*, by any joint deed, to revoke the trusts, and declare new trusts of the premises.

By other deeds executed on the same day, the *Bramshaw Hill* estate was conveyed to the new trustees, with certain provisions as to the repairs; and it was provided that £519, part of the £6519, should be retained to pay succession duty and expenses. The deed of 1854 was not referred to in any of these deeds.

J. T. Turner was engaged to be married at the time when the deeds were prepared; and shortly after the execution of the deeds he was married, but he continued to live at *Bramshaw* with his father until 1860, when, in consequence of family differences, the joint residence came to an end. He had at times stated his intention to put an end to the deeds of 1855.

In 1862 *J. T. Turner* employed Messrs. *Leman* as his solicitors. Some discussion seems to have taken place as to the deeds of

1855, and Messrs. *Leman*, as his solicitors, applied in April, 1862, to Messrs. *Hilliard, Dale, & Stretton* on the subject. Messrs. *Hilliard, Dale, & Stretton*, who appeared to be acting for *J. T. B. Phillipson*, thereupon wrote to Messrs. *Leman & Co.* on the 30th of April, 1862:—"*Re Turner*.—Dear Sirs,—We have considered your application for the production of any evidence we may have relative to the settlement of 1855, and we beg to inform you that we think it inconsistent with our duty towards those for whom we act to give any further information upon the subject, Mr. *Turner*' avowed object in seeking for information being the institution of proceedings to disturb or set aside the deed."

In November, 1868, Messrs. *Leman & Co.* wrote to Messrs. *Dale & Stretton*, complaining of the state of repair of *Bramshaw House*. They wrote again in January, 1869, to the same effect, and threatened proceedings. On the 10th of March, 1869, *J. T. Turner* filed the original bill in this suit against the trustees of the deed of 1855, and *J. T. B. Phillipson*, his wife, and daughter.

The bill, as afterwards amended, stated as above-mentioned, and stated that the Plaintiff, when he executed the deeds of 1855, was subject to the influence of his father and step-mother, and was wholly inexperienced in matters of business; that he had no separate legal adviser, and that the terms of the deed were such as no legal adviser would have allowed him to execute; that he, in 1862, for the first time discovered that the settlement of 1855 was contrary to his intention; but he had abstained from taking any proceedings to have the deed rectified, because during the life of *J. T. B. Phillipson* it was possible that the course of events might have made such proceedings unnecessary, but that as it was necessary to obtain the directions of the Court as to the repair of *Bramshaw House*, he was advised to assert his right. And the bill prayed that (the Plaintiff being willing to be bound by the deed of 1855 to the extent of his intentions) the deed might be rectified by limiting the trusts thereof to the *Bramshaw Hill* estate, and the £6000 Reduced, and by expunging the powers of revocation and new appointment given to *J. T. B. Phillipson* in the event of his second marriage; and that the trustees might be ordered to repair *Bramshaw House* and to account for certain parts of the funds alleged to have been improperly invested.

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The Defendants, *J. T. B. Phillipson* and his wife and daughter, by their answer stated that *J. T. Turner* intended to make the settlement of 1855, and perfectly understood what it was. They also alleged that the Plaintiff had, by laches and by allowing them to rely upon the settlement, lost his right to have the same rectified. After the bill was filed *J. T. B. Phillipson* offered to give up his power of appointment in the event of his marrying a third wife.

Evidence was produced on both sides, the effect of which is stated by his Lordship in his judgment.

The Vice-Chancellor *Malins* was of opinion that the deed was the deliberate act of the Plaintiff, who was not under undue influence, and also that the delay was fatal. His Honour dismissed the bill against all the Defendants with costs as between solicitor and client, so far as the bill sought to have the deed of 1855 rectified; but gave directions as to the repairs of *Bramshaw House*, and directed an inquiry as to the funds alleged to have been improperly invested. (1).

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(1) 1871. July 8. SIR R. MALINS, V.C., after stating the facts of the case, said that this bill had been filed in 1869 to undo what the Plaintiff, after full consideration, had done in 1855. Such deeds ought not to be avoided on slight grounds: *Jenner* v. *Jenner* (2 Giff. 232)(a) The principles on which the Court interfered to set aside family arrangements of this kind were well settled and were well explained by Lord *Cranworth* in delivering judgment on *Savery* v. *King* (5 H. L. C. 627, 655). The rule was also well laid down in *Hoghton* v. *Hoghton* (15 Beav. 278). The first question to be decided was whether this deed was the deliberate act of the Plaintiff or was brought about by the improper influence of which the Plaintiff complained. A deed which was a pure voluntary well-understood act must stand, as was stated in *Huguenin* v. *Baseley* (14 Ves. 296) and *Wright* v. *Vanderplank* (8 D. M. & G. 13). And a complete consideration of all the circumstances and of the evidence led his Honour irresistibly to the conclusion that the execution of the deed was the voluntary, deliberate, and well-understood act of the Plaintiff, and shewed that he had ample, competent, and independent professional advice from the commencement down to the close of the transaction. His Honour then stated and commented on the facts, coming to the conclusion that the deed, having been executed after upwards of nine months' deliberation, and with the most perfect protection thrown around the Plaintiff, the case attempted to be made of want of knowledge and of want of independent advice entirely failed. His Honour was of opinion that the case of undue parental influence also failed, and that there was evidence that the young man was of great determination of character and not under the control of his father. His Honour then stated the evidence as-

(a) S C 6 Jur N.S. 668

The Plaintiff appealed.

Mr. *Cole*, Q.C., and Mr. *Haynes*, for the Plaintiff:—

The Plaintiff, who was only recently of age, executed the deed under undue parental influence. The principles of the Court on this subject are laid down in *Ex parte James* (1); *Hatch* v. *Hatch* (2); *Hoghton* v. *Hoghton* (3); *Wright* v. *Vanderplank* (4); *Savery* v. *King* (5); *Baker* v. *Bradley* (6).

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shewing this to be the case. His Honour thought that, considering the position of the Plaintiff, the settlement was not unreasonable in amount, and entered into calculations to shew that this was the case. The son could not have left his step-mother and half-sister entirely destitute.

The deed of 1854 must also be taken as part of the same transaction, and as by it the father gave up his power of appointment in favour of the children of the son, the deeds of 1855 were not entirely voluntary. *Savery* v. *King* (5 H. L. C. 627) was clearly distinguishable, as there the son was never emancipated. In *Archer* v. *Hudson* (7 Beav. 551) a niece gave her fortune, which was unreasonable. In *Hoghton* v. *Hoghton* (15 Beav. 278) there was a total absence of protection. *Cooke* v. *Lamotte* (15 Beav. 234) was a case of imposition. In *Baker* v. *Bradley* (7 D. M. & G. 597) (a) the settlor was mistaken. In *Hartopp* v. *Hartopp* (21 Beav. 259) (b) and *Dimsdale* v. *Dimsdale* (3 Drew. 556) the deeds were not set aside. In *Jenner* v. *Jenner* (2 D. F. & J. 350) (c) and *Wright* v. *Vanderplank* (2 K. & J. 1; 8 D. M. & G. 133) (4) the delay of the Plaintiff was considered fatal.

Upon the whole case, therefore, His Honour was satisfied that the deeds of 1855 simply carried into effect the deliberate, well-considered intentions of the Plaintiff; that he had ample independent advice which put him in possession of a distinct knowledge of what he was about to do; and that the arrangement, having regard to the situation of the family and the relative circumstances of the father and son at the time, was reasonable and proper, with the exception, perhaps, of the possible provision for the third wife and family of the father—a provision which, however, did not carry the bounty of the Plaintiff to his father and his family beyond just limits.

His Honour would, therefore, have been of opinion that the Plaintiff's case had failed even if the transaction had been recent; but in addition to the other objections, the lapse of fourteen years and the delay of seven years after the Plaintiff had certainly full knowledge of his rights were fatal. It was much to be regretted that the Plaintiff was ever allowed to file the bill, raising one of the most unjustifiable contests that ever was raised in a Court of justice; and His Honour was satisfied that the bill must, so far as it sought to impeach the transactions of 1855, be dismissed with costs. His Honour subsequently gave the costs as between solicitor and client. LR 12 Eq 438.

(1) 8 Ves. 337.

(2) 9 Ves. 292.

(3) 15 Beav. 278.

(4) 2 K. & J. 1; 1 Jur. (N. S.) 932; 8 D. M. & G. 133. 2 Jur N.S. 579.

(5) 5 H. L. C. 627.

(6) 7 D. M. & G. 597; 1 Jur. (N. S.) 489. 2 Jur N.S 98.

(a) S C 2 Jur N.S. 98.
(b) S C 2 Jur N.S. 794
(c) S C 6 Jur N.S. 1315.

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Moreover, the settlement is, on the face of it, unreasonable; for in the event of the Plaintiff's death, his wife will have actually a smaller income than his step-mother, and his younger children will have less than his half-sister. There can be no justification for taking his mother's property, and giving it to his father's second wife and her daughter. The Defendant has offered to release his power of appointment, but that will not make this settlement good: *Broun* v. *Kennedy* (1).

We further contend that the Plaintiff did not understand the transaction and had no independent advice. Even if he had, that would not do away with the effect of undue influence.

The Vice-Chancellor relied on the lapse of time, but that is no defence when there has been no change of circumstances in the interval. *Hatch* v. *Hatch* (2); *Savery* v. *King* (3); *Coutts* v. *Acworth* (4); *Wollaston* v. *Tribe* (5). The property was all reversionary and so remains; nothing has been done under the deed, and there was no reason to proceed to set it aside until it came into operation.

Sir *Roundell Palmer*, Q.C., Mr. *Fry*, Q.C., and Mr. *Chitty*, for Mr. *Phillipson* and his wife and step-daughter:—

It is clear that the Plaintiff, though he may now have altered his mind, knew perfectly well what the settlement was, and when he now speaks as to his want of knowledge, he is stating what has been suggested by his advisers. He had a large income, and it was perfectly reasonable that he should be willing to provide for his step-mother and his half-sister, who would otherwise, after living comfortably, be left in a miserable position on the death of the father. If he had been a ward about to be married, the Court would have approved of such a settlement. He admits that as to part the settlement is good; but if it was obtained by undue influence, it is bad altogether. Moreover, the deed of 1854, by which the father released his power to appoint to the children of the son, who was going to be married, forms a valuable consideration for this

(1) 33 Beav. 133. 9 Jur Ns 1163
(2) 9 Ves. 292.
(3) 5 H. L. C. 627.
(4) Law Rep. 8 Eq. 558.
(5) Law Rep. 9 Eq. 44.

deed. But the lapse of time is fatal: *Wright* v. *Vanderplank* (1). The father, relying on this deed—*Jarratt* v. *Aldam* (2)—has gone on spending his income, and not saving, or insuring his life. Now it is too late to save, and at his age insurance would be ruinous. Moreover, the Plaintiff has lately acted on these deeds by calling on the trustees to repair *Bramshaw House.*

Mr. *Glasse,* Q.C., and Mr. *Dale,* for the trustees of the deed, supported it:—

If this deed is to be set aside because this young man had not a separate solicitor, then, in every case of a family settlement, every party who is to be bound must employ a separate solicitor. It would be difficult to imagine anything more vexatious or needlessly expensive. No one likes the introduction of a stranger in such matters.

Mr. *Cole,* in reply:—

No one ever gave the son proper advice until 1862, and his solicitors immediately applied for copies of the deeds, which were refused. But there was no occasion for him to interfere until the death of his father. He always gave notice of his intention to dispute the settlement at the proper time, and why should he do more? Circumstances might happen which would render the deed of no consequence at the death of the father.

Dec. 22. LORD HATHERLEY, L.C.:—

This is an appeal from a decision of the Vice-Chancellor *Malins,* in a suit by a son to set aside certain portions of a deed which he describes as having been obtained from him, soon after he came of age, by undue influence on the part of his father.

The Vice-Chancellor seems to have felt no difficulty, either with regard to the character of the transaction, or with regard to the question of the delay on the part of the son in seeking his remedy. With regard to the character of the transaction in its inception, the Vice-Chancellor has dealt with the case in a manner which

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(1) 2 K. & J. 1; 1 Jur. (N.S.) 932; 8 D. M & G. 133. 1 Jur ns 579

(2) Law Rep. 9 Eq. 463.

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has occasioned me considerable anxiety and labour in a thorough examination of the facts, in order to see how far it was possible to give way to the views that the Vice-Chancellor appears to have taken of the original character of the transaction.

I think that nothing can be more important to maintain than the jurisdiction, long asserted and upheld by the Court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy, and, as was laid down by the Master of the Rolls in *Hoghton* v. *Hoghton* (1), two things are required to be proved by a parent setting up a deed in such a case: First, that the deed was the real and actual deed of the child, and was intended by the child to have the operation which it has; and secondly, that that intention was fairly produced.

As regards this transaction, I cannot explain the view I take of it without a brief sketch of the exact position of the parties.

[His Lordship then stated the facts as to the execution of the settlement, and said that he could not consider it a reasonable provision for the son to make under the circumstances, especially as the son was at the time considerably in debt. His Lordship then observed, upon other facts in the case, that the son had no separate solicitor, that during the whole of the negotiations the father was pressing the matter on, and that there was no trace of the son having originated one single proposition, though he understood what was going on.]

The Vice-Chancellor seems to have been influenced by some considerations which, as I must say, with great deference to his judgment, appear to me to have no bearing whatever on the case. The Vice-Chancellor seems to have been struck with the expressions about re-settlement and family arrangements, and with the cases on that subject: he laid great stress on them, and spoke of this as being a very proper arrangement. I do not think those cases have anything whatever to do with the matter. This case does not in the slightest degree partake of the character of a re-settlement of family estates or family property. The son is giving

(1) 15 Beav. 278, 302.

back to the father what had come from the father, but he also gives his mother's property; and as the deed now stands, if there should be a third marriage, the son may take no interest whatever in that property. It is not a re-settlement, but an absolute sweeping of it away from the son, and handing it over to the step-mother and half-sister. The cases of re-settlement when a son comes of age are not at all analogous, as the father in these cases usually allows the son an immediate income. But this is not a case of re-settlement, and the question is, under what circumstances it was made. The observations of the Master of the Rolls in *Hoghton* v. *Hoghton* (1) on this subject are very just. Parental influence may be rightly exercised for the benefit of the child, and is continually so exercised; and in all cases of family arrangements, and of re-settlements for the benefit of the child as an integral member of the family, the Court considers that the father's influence should be exercised, and makes no further requirement. But if the father himself takes a benefit, then arises the jealousy of the Court, and we have to consider how the child's intention was produced. And even if we find the intention which the instrument describes, still the question arises, how has that intention been produced? Influence is a thing which is assumed as between father and child—not that the influence is assumed to be unduly exercised, but the influence is assumed, and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction, and the Court has to see that every proper protection was thrown around the child, and that the child has deliberately and advisedly, and under protection, done that by which his father has obtained a benefit.

[His Lordship then commented on the evidence, as shewing that the son had not, under the circumstances, sufficient protection.]

In this state of things I should have felt very great difficulty in saying that this deed could be maintained as against the son if, soon after his marriage, he had come to complain of it, and to say that it ought to be set aside.

The Vice-Chancellor, however, was evidently influenced by another consideration, which I think had an undue weight upon his mind. Some evidence is given to shew that the young gentle-

(1) 15 Beav. 278, 302.

man was not likely from his self-will to be subject to undue influence.

[His Lordship then mentioned instances shewing that the Plaintiff had acted obstinately, though foolishly.]

I should say that a young man like that was a person most requiring protection. No doubt there are plenty of people in this world whom it is difficult to drive, but whom anybody can lead. It is well known that people who are generally most difficult to drive, are usually about the most easily to be led by others who understand them. When we talk of parental influence we do not think of terror in connection with it—that is not the primary idea—it is not terror and coercion, but kindness and affection, which may bias the child's mind, and induce the child to do that which may be highly imprudent, and which, if the child were properly protected, he would never do. It does appear to me that if ever there was a person requiring extreme protection, it would be a person who could do such absolutely absurd acts as this young man would do if led into them by obstinacy, or by any other passion; therefore I wholly pass by that argument.

[His Lordship then said that from the evidence he was satisfied that the Plaintiff knew at the time that all the property was comprised in the deed, and knew what the nature of the deed was, but his Lordship was not satisfied that the Plaintiff had had explained to him the provision which was ultimately inserted, giving the father power to appoint in the event of his marrying a third wife. His Lordship could not agree with the Vice-Chancellor, either that this was a proper deed or that the young man was under no influence; and his Lordship held that if the bill had been filed in due time, the Plaintiff must have had the relief he asked for.]

I now come to that part of the case which has given me the greatest trouble and anxiety. The deed was executed in 1855, just before the marriage of the son, and he and his wife continued to reside with his father until 1860. During this time there were occasional disputes, and he had said when angry that he would put an end to the deed. He had at this time ample means, and could have procured advice. Then, in 1860, he left his father's house, and in 1862 he actually had independent solicitors, and from Mr. *Hilliard's* letter of the 30th of April, 1862, it is clear that there

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must have been a statement that the son thought of disputing the deed. But from 1862 to 1869 he took no step whatever to assert his rights.

Now, let us consider what is the right course to be taken in a matter of this kind as between father and child? *Wright* v. *Vanderplank* (1) goes a long way to shew that, if the intention to set aside such a deed exists, it should at once be put into execution. As the Court in that case very justly lays down, if it is shewn that the influence has once ceased, the Court expects to find steps immediately taken in order that the persons affected may know what line of conduct they are to adopt with regard to the transaction which is, or may be, subject to be impugned. This was a deed which could be confirmed, assuming, as I now do, that the son knew all the facts, and that he had the intention to make the deed, however that intention might have been produced. But the father was left very much in the position of the father in *Wright* v. *Vanderplank,* though, no doubt, in that case there was the additional circumstance that the child never impeached the deed—it was only the husband. I quite admit that that makes a very broad distinction, and I am not citing *Wright* v. *Vanderplank* as carrying me to the full extent of what I am now stating, but that case illustrates the reason of the rule. The son is allowing the father and step-mother and half-sister to go on in a course of living which assumes that they have at their disposal an income of £1000 or £1100 a year. But if the son intends to say that the father and the step-mother are to wait and to be kept in uncertainty as to the income of the step-mother and her daughter, when the son has it in his power to determine what it shall be, and has at his disposal every means of advice which he can possibly require, it is not reasonable for the Court to allow the child to hang, as it were, a sword over the parent's head, and to keep him in suspense for an indefinite length of time. I apprehend that the Court does require a person to be prompt in asserting his rights in a case of this description, and that the father should not be allowed to go on until he is upwards of seventy years of age, thinking that there is a certain provision for his wife, and then to find out that he has been mistaken, and that there is

(1) 8 D. M. & G. 133. 2 Jur NS 599

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a very much smaller provision for his wife and his daughter. That is not a right or reasonable course, and it is one which this Court has never sanctioned.

No doubt the son did, even whilst living with the father, express his dissatisfaction with the deed; but there was nothing to lead the father to suppose that the son intended seriously to dispute it. Then, in 1860, the son left the father's house, and obtained independent advice. Moreover, it is clear that in 1862 the question of setting aside the deed was discussed by his solicitors, but no further steps were taken, and the bill in this suit was not filed until 1869. On this part of the case I agree with the Vice-Chancellor to a certain extent.

The case of *Hatch* v. *Hatch* (1) was totally different, as a gross fraud had there been committed, and the person committing it could not expect to be spared at any time.

There is one point remaining, which is as to the power given to the father in the event of a third marriage. This, as it appears to me, was never explained or known to the son when he executed the deed, and therefore the question of delay does not affect this part of the case. [His Lordship stated the circumstances.] It has always been said, and truly, that there is great difficulty in reforming a voluntary deed, because, if any part of it is shewn to be contrary to the intention of the parties, you can only deal with it by setting the whole aside, as in *Hoghton* v. *Hoghton* (2). But here the son agrees that part of the deed ought to stand, and I have, therefore, power as against him; and I have certainly power against the father, who is a Defendant, and I shall direct the settlement to be rectified by striking out of it the power in question.

I think, also, that the father ought not to have costs, and I am surprised that he should have asked for them, seeing the way in which he had been dealt with by the son. The trustees will have their costs from the Plaintiff, but only as between party and party.

In these respects the decree will be varied. No costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Leman & Co.*

Solicitors for the Defendants: Messrs. *Newman, Dale, & Stretton.*

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(1) 9 Ves. 292.

(2) 15 Beav. 278.

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[1869 S. 90.]

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Conversion—Election—Will of Married Woman—Trust of Land for Alien—Naturalization Act, 1870 (33 *Vict. c.* 14), *ss.* 2, 18.

22 Ch D
248, 257

By an indenture, dated in March, 1862, lands were conveyed by two tenants in common, *L.* and *S.*, to a trustee upon trust to sell and to hold the proceeds in trust for *L.* and *S.* in equal shares, and as to the share of *S.* for her separate use. The indenture contained powers of exchange and partition; and it was declared that until the sale the trustee should hold the lands upon trust as to one moiety for *L.* and as to the other moiety for *S.* for her separate use.

By articles of agreement made in the following month, it was agreed that the trustee should allot the lands described in the first schedule to *L.*, and those described in the second schedule to *S.*, and should stand possessed of the allotments upon the same trusts as were by the deed of March, 1862, declared of the respective moieties, but without prejudice to the powers vested in the trustee by that indenture.

S. was a married woman, and her husband was an alien. By her will, made in August, 1862, she gave all her landed property situated at *E.*, being her allotment under the articles of agreement, which still remained unsold, to her husband for life, with remainder over:—

Held (reversing the decision of *Stuart*, V.C.), that the trust for sale had been put an end to by the agreement of April, 1862; and that the property passed as real estate under the will of *S.*:

Held, also, that if the trust for sale had been still subsisting, *S.* had elected to take the property as real estate.

The *Naturalization Act*, 1870 (33 Vict. c. 14), s. 2, is not retrospective.

The Court of Chancery will enforce in favour of the Crown a trust of land for an alien created prior to the Act.

Barrow v. *Wadkin* (1) approved of.

THIS was an appeal from a decree of Vice-Chancellor *Stuart.*

By an indenture, dated the 10th of March, 1862, certain freehold and copyhold hereditaments at *Ealing*, to which *William Lockyer Loveday*, and *Matilda Susan*, wife of *Henri Sosthene*, Baron *de St. Sauveur*, were entitled as tenants in common, were conveyed and covenanted to be surrendered to the Plaintiff, *H. L. Sharp*, his heirs and assigns, upon trust from time to time, or at any time thereafter, without any consent or concurrence on the part of

(1) 24 Beav. 1.

W. L. Loveday and the Baroness *de St. Sauveur*, or any other person, to sell the same, with power to postpone the sale thereof as he, the Plaintiff, should think fit. The indenture contained a power for the Plaintiff to exchange all or any part of the hereditaments, and also to allot by way of complete or partial partition any parts of the hereditaments therein comprised, or of the hereditaments to be taken in exchange as aforesaid, as and for the share and part of the share in severalty of *W. L. Loveday* and the Baroness *de St. Sauveur*. The indenture then contained a declaration that the Plaintiff should stand possessed of the moneys to arise by any sale, or to be received for equality of exchange, upon trust for *W. L. Loveday* and the Baroness *de St. Sauveur*, and their respective executors, administrators, and assigns, in equal shares as tenants in common, and as to the share of the Baroness for her separate use. And it was further declared that any lands which might be taken in exchange under the power therein contained, should be held upon the trusts and subject to the powers thereby declared concerning the hereditaments thereby conveyed and covenanted to be surrendered. And it was declared that so long as the said lands and hereditaments, or any lands and hereditaments which should be taken in exchange, should remain unsold, the Plaintiff should stand possessed of and interested in the same as to one undivided moiety in trust for *W. L. Loveday*, his heirs and assigns; and as to the other undivided moiety, in trust for such persons and for such intents and purposes as the Baroness *de St. Sauveur*, notwithstanding her coverture, should appoint by deed or will, and in default of appointment in trust for the Baroness *de St. Sauveur*, her heirs and assigns.

On the 8th of April, 1862, articles of agreement were executed by *W. L. Loveday* and the Baroness *de St. Sauveur*, by which it was recited that by the indenture of the 10th of March, 1862, the said freehold and copyhold hereditaments had been conveyed and covenanted to be surrendered to the use of the Plaintiff, his heirs and assigns, upon the trusts therein declared in favour of the said *W. L. Lockyer*, his heirs and assigns, and of the Baroness *de St. Sauveur*, her appointees, heirs, and assigns, as therein particularly mentioned, with power for the said Plaintiff to allot, by way of complete or partial partition, any part or parts of the said freehold and copyhold hereditaments as and for the share in severalty of either of them the said *W. L. Loveday* and the Baroness *de St. Sauveur;* and it was witnessed that the said *W. L. Loveday* and the Baroness *de St. Sauveur* mutually covenanted and agreed, and the Baroness *de St. Sauveur* directed and appointed, that the Plaintiff should and might allot the said hereditaments and premises comprised in the first schedule thereto as and for the share in severalty of *W. L. Loveday*, and the hereditaments comprised in the second schedule as and for the share in severalty of the Baroness *de St. Sauveur* of and in the said hereditaments; and that the Plaintiff should stand possessed of each such respective allotment on the same respective trusts as were by the said recited indenture declared concerning the respective undivided moieties of the said *W. L. Loveday* and the Baroness *de St. Sauveur* in the said hereditaments; but that nothing therein contained should prejudice or affect any of the powers or authorities vested in the Plaintiff under or by virtue of the said recited indenture of the 10th of March, 1862, or any of the trusts or provisions therein contained.

The Baroness *de St. Sauveur* was domiciled in *France*, and her husband was an alien, a subject of the French Emperor.

The hereditaments allotted to the Baroness *de St. Sauveur* remained unsold to the time of her death.

The Baroness made her will dated the 15th of August, 1862, and thereby gave to her husband, the Baron *de St. Sauveur*, all her moveables of every description, and funded property, for his sole use and benefit for ever. The will then proceeded as follows:—

"I leave also to my husband for and during his life only, all my landed property situated at *Ealing*, in the county of *Middlesex*, in *England*. After the death of my said husband, the aforesaid landed property I give and bequeath to my brother *W. L. Loveday* and to my sister Mrs. *Emily de Gheus*, to be equally divided between them, for his and her and their own use and benefit for ever, with a charge to them on the rental for an annuity of £50 to my sister-in-law Mrs. *H. Loveday*, and her daughter *Julia Loveday*, my niece, revertible to the survivor during her life only."

The Baroness died in October, 1866.

Emily de Gheus died in her lifetime.

The present bill was filed to carry into effect the trusts of the deeds of the 10th of March, 1862, and the 8th of April, 1862. The principal questions raised in the suit were whether the hereditaments allotted to the Baroness passed under her will as real or personal estate; and if as real estate, whether her husband, being an alien, was able to take a life interest in them, or whether the Crown was entitled to his interest.

The Vice-Chancellor held that the property at the time of the death of the Baroness was converted into personalty, and that she had shewn no intention in her will of taking it as realty (1).

(1) 1869. June 9.

SIR J. STUART, V.C., said that although these deeds had been prepared in a bungling manner, he thought their true construction could be arrived at without doing much violence to their language. Notwithstanding the inconsistent provisions of the deed of March, 1862, he was of opinion that the deed contained a clear trust for conversion of the property. The agreement of April, 1862, was nothing more than an agreement for partition, and by it the trustee was directed to hold the property upon the same trusts as were declared concerning it by the deed of March, 1862, and this left the property in the trustee's hands, subject to the trust for sale and conversion. That being so, the next difficulty arose upon the construction of the will. It was clear that this lady had the right of saying whether she would take this property as realty or personalty—but the act relied on to shew an election must be clear and unequivocal. Looking at the form of the bequest in the present case, there was no evidence, except the use of the words "landed property," to shew that the testatrix meant to treat this property as realty. But looking at the surrounding circumstances, the purpose for which the trust for conversion appeared to have been created, and the fact that at the date of the testator's death the property had not been converted, he did not think that the use of the words "landed property" in the bequest was enough. Had there been words of limitation, that would have been a strong manifestation of intention to elect to take the property as realty. But there was another consideration. If there were two modes of construing a will, according to one of which modes the intention would be upheld, while according to the other it would fail, it was the duty of the Court to strive to uphold the former construction, Now, to hold that this testatrix by the bequest of this property in her will elected to take it as land, would be to render void the gift of it to her husband for his life. He was of opinion that according to the true construction of the will the words "landed property" meant all the testatrix's estate and interest in the land at *Ealing*, and that she by her will elected to treat the property in question as personalty. Consequently the Baron *de St. Sauveur* was entitled to a life interest in the proceeds of the sale thereof.

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From this decision appeals were brought by the heir-at-law and customary heir, and the Attorney-General appeared.

Mr. *Greene*, Q.C., and Mr. *G. T. Edwards* for the heir-at-law, and

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the customary heir:—

There was no absolute trust for conversion. The trustee had a discretion as to the sale, and the trust for sale was meant to be entirely ancillary to the partition. After the partition had been made by the deed of the 8th of April, 1862, the trust for sale was at an end: *Cookson* v. *Cookson* (1); *Shadforth* v. *Temple* (2); *Lucas* v. *Brandreth* (3). But if there was a conversion, the Baroness had the power to elect to take the property as land, as it had not been sold at the time of her death, and this she has done by devising it in her will as real estate: *Crabtree* v. *Bramble* (4); *Stead* v. *Newdigate* (5); *Wheldale* v. *Partridge* (6). The devise of the life estate to the Baron *de St. Sauveur* was void, as he was an alien. Whether the life estate which fails will go to the Crown or to the heir is a question for future consideration. The fact that the effect of the testatrix treating it as real estate would cause a forfeiture creates no presumption against that construction. The Court must construe the words as they stand without regard to the consequences. This has often been decided in cases under the *Mortmain Act*.

Mr. *Shapter*, Q.C., and Mr. *Rawlinson*, for the two annuitants under the will, referred to *Jee* v. *Audley* (7).

Mr. *Joshua Williams*, Q.C., and Mr. *Cookson*, for the Baron *de St. Sauveur*, and

Mr. *Fry*, Q.C., and Mr. *Graham Hastings*, for the next of kin according to the French law:—

There was an absolute conversion of the property into money by the deed of the 10th of March, 1862. The criterion by which the Court determines whether there is an absolute conversion, is whether

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(1) 12 Cl. & F. 121.
(2) 10 Sim. 184.
(3) 28 Beav. 273. 6 Jur. N.S. 945.
(4) 3 Atk. 680.
(5) 2 Mer. 521
(6) 8 Ves. 227.
(7) 1 Cox, 324.

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there is an absolute direction to sell at some time or other. Here there was a power to postpone the sale, but the intention of the parties was that the property should be sold at all events. This is evidenced by their reserving the old powers and trusts in the partition of the 8th of April, 1862: *Master* v. *De Croismar* (1); *Buchanan* v. *Angus* (2); *Du Hourmelin* v. *Sheldon* (3). The Baroness being a married woman could do no act to elect during her life: *Lechmere* v. *Brotheridge* (4); *Holloway* v. *Radcliffe* (5). By her will she has shewn no intention to reconvert the property into real estate. The words "landed property" were not sufficient for that purpose; they were merely descriptive. If the effect of the will is ambiguous the Court will support her intention of benefiting her husband. This is different from the cases under the *Mortmain Act*, for election is purely a question of intention, and the Court will consider the whole scope of the will and the circumstances under which the property is held: *Triquet* v. *Thornton* (6).

Mr. *Hemming*, for the Attorney-General.

Mr. *Karslake*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff.

Lord Hatherley, L.C.:—

Were it not for the decision of the Vice-Chancellor, and notwithstanding the able arguments which have been offered in support of that decision, I should have entertained very little doubt as to the true effect of the deeds and the will in this case.

The Vice-Chancellor appears to have entertained the opinion that the object of the parties throughout this transaction was that the husband of the testatrix, who was an alien, should have the benefit of the property, and that their mode of carrying that object into effect was by converting it into personal estate.

As regards the original deed of March, 1862, I may remark that there is not a trace of that object in the deed; but, on the contrary, it seems plain to me that the real intent of that deed was to get rid of the inconvenient mode of enjoyment as a tenancy in

(1) 11 Beav. 184.
(2) 4 Macq. 374.
(3) 4 My. & Cr. 525.
(4) 32 Beav. 353. 9 Jur. N.S.
(5) 23 Ibid. 163 3 Jur. N.S.
(6) 13 Ves. 345.

common, and the scheme therefore is that by all means the property should be severed, and that every power should be given to the trustee for the purpose of effecting that severance. For that purpose powers of sale, exchange, and partition were given to the trustee, so that either in land or in money, or partly in land and partly in money, the parties might have their shares in severalty, free from the entanglement of a tenancy in common. If this is borne in mind I think that all the clauses of the deed are consistent. If the trustee had done what the parties afterwards agreed between themselves to do, namely, had allotted to each their portions in severalty, he would have held one moiety upon trust for *Loveday*, and the other upon trust for the Baroness for her separate use, and to dispose of it as she should by deed or will direct, and then the whole trust would have been exhausted.

But in April the parties, without calling in the trustee, entered into an agreement to make a partition as between themselves, and to hold the property in separate portions. When that was done I should have thought it clear, except for some expressions contained in the deed of April, that there was entirely an end of the power of sale. But then there is an expression in that deed to the effect that this partition having been made, the property should be considered as held on the same trusts as the undivided moieties, under the deed of March. This, no doubt, creates difficulty, but it is clear that it cannot be taken to mean that *Loveday* should have the right to say that his sister's portion should be sold, whether she wished it or not, although when it was sold the whole money would go to her. I think the only way of harmonizing the two deeds is to consider the second deed as if it had been inserted in the deed of March. What then would have happened if the trustee had made a partition of the whole property? I apprehend everything would have been at an end except the provision with regard to the Baroness having the estate for her separate use. In fact, it appears to me that at the time when the lady came to make her will the parties had discharged the absolute trust for sale; and although the deed speaks of the trusts with reference to the moieties, they must be taken to be such trusts as are consistent with the deed and with the partition which could now be made,

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that is, a trust to convey the estates to *Loveday* and the lady according to their respective interests.

But, assuming that the trust for sale was still in existence with respect to the lady's share, which was now "at home," it was either land or money, as she might elect, and we must see how she has treated it in her will. I feel no doubt, nor, as it appears to me, did the Vice-Chancellor feel any doubt, that if this had been an ordinary will the land would have passed as real estate. But the Vice-Chancellor says, that the Court ought to consider that this lady's husband was an alien, and that she could not legally give it to him as land, and therefore the Court ought to give effect to her intention by construing it as a gift of personal estate. But I conceive that is not a sound construction of the instrument. We must see what the will means on the face of it. There is a plain gift of her moveable and personal property to her husband, and she makes a plain distinction between that and the "landed property" at *Ealing*, in which she only gives him a limited interest. And this is confirmed by her charge of the annuities on the "rental" of the *Ealing* property. It appears to me that there is the clearest possible indication of her intending her husband to take the property as land.

The Vice-Chancellor's decree must be varied by declaring that, according to the true construction of the two deeds and of the will, the property at *Ealing* must be taken to have passed by the will as real estate.

Mr. *Joshua Williams*, Q.C., and Mr. *Cookson*, then contended that the Act of the 33 Vict. c. 14 (passed on the 12th of May, 1870), by which aliens were rendered capable of holding real estates was retrospective. The words of sect. 2, enacting that "real and personal property of every description may be taken, acquired, held, or disposed of by an alien," were perfectly general, and contained no words importing the future. And the word "person," in the third exception, did not apply to an alien, as was evidenced by the use of the words "devolution by law." The exceptions in the 18th section had only reference to the repealed statutes.

Mr. *Hemming*, for the Attorney-General, was not called on.

LORD HATHERLEY, L.C.:—

I think it clear that the words of the Act only give certain rights to persons who shall not be within the exception contained in the 2nd clause of the section. I apprehend that the word "person" is meant to apply generally, and that it refers to all parties, whether they be aliens or otherwise. I must hold that this gentleman is not protected in respect of this right, which accrued to him anterior to the passing of this Act.

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Dec. 20. The further question was this day argued, whether the Court would enforce in favour of the Crown the trust created by the will in favour of the alien. The Lord Chancellor consented to hear the case as an original hearing on further consideration, and it was assumed for the purpose of the argument that office had been found.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Hemming*, for the Attorney-General:—

The right of the Crown to come to this Court to enforce a trust of real estate created in favour of an alien, is established by *Barrow* v. *Wadkin* (1), where all the authorities were fully considered. In *Rittson* v. *Stordy* (2), where there was a contrary decision, the Vice-Chancellor *Stuart* was misled by an erroneous report of *Attorney-General* v. *Sands*. In that case, as reported in *Hardres* (3), Sir *M. Hales* is reported to have said that a trust for an alien is forfeitable. But in the report in *Parker* (4) there is nothing said about forfeiture, although it was there decided that the trust belonged to the Crown. The Crown takes the trust not by forfeiture but by its prerogative, as *bona vacantia*. As soon as office has been found the Crown can enforce its right in any of the Courts, according to the nature of the property: *Duplessis* v. *Attorney-General* (5); *Rex* v. *Holland* (6); *Gilbert* on Uses (7); *Godfrey and Dixon's Case* (8). In *Burgess* v. *Wheate* (9)

(1) 24 Beav. 1. 3 Jur. N.S. 679
(2) 3 Sm. & Giff. 230. 1 Jur. N.S. 71,
(3) Page 488.
(4) Page 156.
(5) 1 Bro. P. C. 415.
(6) Aleyn, 14.
(7) 3rd Ed. p. 86.
(8) Godbold, 275.
(9) 1 Eden, 177.

there was no *cestui que trust* in existence, and there was therefore no trust estate; that case, therefore, has no application, and, if necessary, might well be questioned. The decision on this point in *Rittson* v. *Stordy* (1) was not approved on appeal (2).

Mr. *Joshua Williams*, Q.C., and Mr. *Cookson*, for the Baron *de St. Sauveur*, supported the same view. They referred to *Fourdrin* v. *Gowdey* (3).

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the customary heir, and

Mr. *Greene*, Q.C., and Mr. *G. T. Edwards*, for the heirs-at-law:—

The case of *Barrow* v. *Wadkin* (4) was never carried to a Court of appeal, and it shews, at all events, that the question was not then considered concluded by authority. If the Crown has the right now claimed it is remarkable that there have not been distinct decisions in the Court of Chancery to that effect. All the old cases now relied on are at common law, and really only amount to *dicta*. The authority of *Rittson* v. *Stordy* has never been overruled by any higher Court. Escheat and forfeiture have no application to equitable estates, and the right of the Crown in this case is of a similar nature. The Crown can only take the rights which the alien had, and as the alien could not come to this Court to enforce his right, neither can the Crown. The only right which the Crown has is to enter, and if the nature of the estate is such that it cannot enter, this Court will not give any relief, for there is no equity in favour of the Crown. The policy of the law was to exclude aliens, not to disenherit the heir-at-law for the benefit of the Crown. [They also referred to 2 Vin. Abr. Alien, §§ 8, 20; 1 Bacon Abr. Alien, C. D.; *Burney* v. *Macdonald* (5); *Walker* v. *Denne* (6); and the statutes 39 & 40 Geo. 3, c. 88; 47 Geo. 3, c. 24.]

Lord Hatherley, L.C.:—

I feel no difficulty in following the decision of the Master of the Rolls in *Barrow* v. *Wadkin*. From a very early time, first, in

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(1) 3 Sm. & Giff. 230. 1 Jur NS 771
(2) 2 Jur. (N.S.) 410.
(3) 3 My. & K. 383.
(4) 24 Beav. 1. 3 Jur N.S.
(5) 15 Sim. 6.
(6) 2 Ves. 170.

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Rex v. *Holland* (1), by the *dicta* of *Rolle* and the other Judges who were present; next, by Lord Chief Justice *Hale*, in *Attorney-General* v. *Sands* (2), where he narrates that opinion, saying that he was counsel in the case, and gives his approbation to the doctrine; then by *Gilbert* in his Treatise on Uses (3); and recently, in the case before the Master of the Rolls, it has been recognised as law that the Crown cannot by virtue of office found oust trustees who are seised of land in trust for an alien, but is driven to its remedy in equity. That doctrine has been recognised by Lord *St. Leonards*, in his edition of *Gilbert* on Uses, as the true result of the authorities. On the other hand, we have *dicta* of Vice-Chancellor *Shadwell*, in *Burney* v. *Macdonald* (4), and a decision of Vice-Chancellor *Stuart*, in *Rittson* v. *Stordy* (5), adverse to the view contended for by the Crown. Such is the state of the authorities.

Now let us look at the reason of the thing. First, it is clear the law does not recognise the possibility of an alien acquiring real estate by act of law; for instance, an alien cannot take as heir or as dowress, the reason assigned being that the law would not do so useless a thing as to cast that on a person which he cannot hold; but at the same time it is undisputed law that gifts may be made to aliens by will, or feoffment, use, covenant to stand seised, or the like, so that a purchase may undoubtedly be made by an alien in his own name, or may be made in trust for him.

In that state of things the law says that the title or interest so acquired shall be held, not for his own use, but for the use of the Crown; so that if it be a legal estate he holds it until office found for the Crown, and when office is found that act relates back to the time when the estate vested in the alien, and then it becomes vested in the Crown.

The view taken by Vice-Chancellor *Stuart* was this: He went back to the opinion of Vice-Chancellor *Shadwell* in *Burney* v. *Macdonald*, which was only a *dictum*, and he says that this Court will not allow so idle a thing to be done as that an alien should sue for the execution of a trust when the whole result of the trust in allowing him so to sue would be that he would take that which he could not any longer hold. Then, passing by the authority of Chief Justice *Hale*, on the ground that that eminent lawyer is made to say in the report which the Vice-Chancellor had before him in *Hardres* (1) of the *Attorney-General* v. *Sands*, that which is not law, he says that he cannot find that the doctrine of Vice-Chancellor *Shadwell* is opposed by any previous *dictum* or authority, and comes to the conclusion that the Crown cannot take that which the alien could not claim, and therefore would not be entitled to the benefit of the trust.

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(1) Aleyn, 14.
(2) Parker, 144.
(3) 3rd Ed. p. 86.
(4) 15 Sim. 6.
(5) 3 Sm. & Giff. 230.

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In the first place, it seems to me there is no decision that an alien cannot apply to this Court for the purpose of having a trust executed; but it appears wholly unnecessary to determine that point. It has now become a mere question of antiquarian law, and I will assume that the alien could not file a bill for that purpose.

The argument against the Crown is this: The Crown can take neither more nor less interest than the alien, and because the alien is deprived of this particular remedy for his rights, it follows that the Crown also will be in the same position, and will not be entitled to the remedy. That appears to me to be taking a prodigious step. There is no dispute about this, that where there is a devise to an alien the Crown must claim it through him. But suppose it is an actual devise of the legal estate, in that case we may assume that the alien could not proceed to acquire the land in a Court of law, and yet the Crown is placed in no such difficulty. It appears to me to be a confusion of ideas to say that because an alien, on account of personal incapacity, cannot sue in respect of that right which otherwise would be vested in him as *cestui que trust*, therefore when all those rights are passed to the Crown for the express purpose of taking away from the alien what it was formerly supposed to be prejudicial to the commonwealth for him to hold, and giving it to the Crown, against which no personal incapacity can be alleged, the Crown cannot sue. Such an argument seems to me most illogical. The Crown takes the alien's interest in the property, and I should suppose would have the same rights for all ordinary purposes of justice of recovering it as it would have in the

(1) Page 495.

case of personalty, where no next of kin are found, and where the Crown has an undoubted right to come to equity to have its rights declared. I cannot see any possible principle upon which the Crown is to be prevented from asserting its rights to real property vested in trustees for an alien unless, indeed, the principle of the Crown coming under no head of equity, to which I will advert presently, could be stretched to that extent. Such a doctrine is at all events directly opposed to what *Hale* thought, and to what *Rolle* and the other Judges thought, and it appears to me that there is no reason whatever for doubting the correctness of their view.

I do not think it altogether unimportant to notice that the statutes, even if you read them in the narrowest sense, shew clearly that property is contemplated, whether purchased by the alien for himself or purchased by him in the name of some other person in trust for himself. They all recognise that such a trust may exist. And when the Crown discovers, by virtue of office found, that the trust is for an alien, it proceeds to have the right declared, and if it finds it is a simple trust, it will not take by immediately entering upon the land, because the right of the trustee would prevent that; but the Crown asserts its right through the medium of the statutes, and having acquired it, assigns it by sign manual, if it thinks fit, to be disposed of by sale or otherwise, so that the alien may have some benefit from the property. Mr. *Hardy* has pressed upon me that there is no actual instance in which the Courts have been asked by the Crown to enforce such a trust. That may be true, but on the other hand there has been no actual decision against the Crown, and there is the great weight of authority, the Acts of Parliament, and the various *dicta* to which I have been referred, in favour of the Crown. Upon principle it appears to me perfectly plain that all the rights of the alien were transferred to the Crown without the disability to enforce them which affects the alien. In *Walker* v. *Denne* (1), where the expression occurs, of the Crown coming under no head of equity, it is clear what the application of the *dictum* was. It was the simple case of a testator having devised property to be laid out in the purchase of land. The purposes of the suit there were undoubtedly to claim that right. In that case there was the failure of a heir,

(1) 2 Ves. 170.

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and the Court was called on to convert purchased land for the express purpose of vesting in the Crown, by escheat, property which did not exist at all in the shape of land. Now it is a well settled doctrine, where the purposes of the will do not require conversion, neither the heir-at-law nor anybody else has any equity to insist on conversion; and the Crown must be bound by the same rule. Both on principle and authority I think I am bound to decide in favour of the Crown with respect to the life interest given to the Baron *de St. Sauveur.*

Solicitors for the Crown: Messrs. *Raven & Bradley.*

Solicitors for all the other parties: Messrs. *Burgoyne, Milnes, & Co.*

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SAVAGE *v.* TYERS.

[1871 S. 109.]

Will—Construction—Estate by Implication—Directions to settle on Marriage under Twenty-one—Special Case.

Ch. D. 415.
Ch. D. 184

A testator directed that his trustees should hold certain personal property in trust for his daughter *S.*, until his granddaughter *M. S.* should attain twenty one, or marry under that age with the consent of her guardians; and when his said granddaughter should attain twenty-one, or before, upon her marriage with such consent, upon trust to pay the income to his said granddaughter for her life for her separate use; and in case of her marriage with such consent, but not otherwise, the property was to be settled on her for life for her separate use, with remainder to her children, and in default of issue, to be at her absolute disposal.

The testator gave other property on like trusts for his other granddaughters, and referred to the property as the "provisions" and the "portions" of his granddaughters. Then followed a gift over on the death of any granddaughter under twenty-one, and without having been married, upon trust for the others in like manner as their original portions; and if all should die under twenty-one, and without having been married, then the shares were to fall into the residue. Two of the granddaughters attained twenty-one, but were still unmarried:—

Held (affirming the decision of *Wickens*, V.C.), that there was no absolute interest given by implication to the granddaughters on their attaining twenty-one without being married; but that they had only an estate for life, subject to any question which might arise in case either of them married.

THIS was an appeal from a decision of Vice-Chancellor *Wickens*, made on a special case founded on the following statements:—

James Tyers, by his will, dated the 30th of September, 1813, appointed four executors of his will, and nominated them, together with his daughter *Matilda Savage*, guardians of his infant grandchildren, and after bequeathing certain legacies, gave a debt which he had upon certain estates in *Jamaica* to his two grandsons, *T. Tyers Savage* and *J. Tyers Savage*, on condition of their taking the name of *Tyers;* and in case of their refusal to do so, he gave them £1000 only, and the residue of the debt to his four granddaughters equally, to be secured for their separate use and the use of their issue as the provision thereinafter made for them was directed to be secured.

The testator then directed that, as to his shares in the *Phœnix Fire Office*, until his granddaughter *Matilda Savage* attained the age of twenty-one years, or should be married with such consent as thereinafter mentioned, his executors should hold them upon trust to pay the dividends and proceeds of such shares to his daughter Mrs. *Savage;* but when his said granddaughter should attain the age of twenty-one years, or before, upon marriage (if she should be married with such consent as was thereinafter mentioned), upon trust to pay the dividends and proceeds to his said granddaughter *Matilda Savage* during her life, but separate and apart from her husband; and in case of the marriage of his said granddaughter *Matilda Savage* (provided such marriage should take place with the approbation of the majority of her guardians or trustees, but not otherwise), then upon such marriage he directed the said shares to be valued, and he gave to his executors such a sum of money as would, with the value of such shares, make up the sum of £2500 payable on such marriage, and to be placed in Government securities, and upon trust to settle the same, together with the said shares, in the names of three of the said trustees for the benefit and provision of his said granddaughter *Matilda Savage*, and for her separate use independent of her husband, with power in such settlement for his said granddaughter *Matilda Savage* to dispose of the same by deed or will duly attested among her issue, if she should have any issue, and with limitations for such issue equally if his said granddaughter *Matilda Savage* should die without so disposing of it, and with like power to dispose of it as she might think proper if she should have no issue, or such issue should fail, and with all such powers and authorities to be contained in such settlement as were usual in cases of strict settlements, and as his said trustees might think requisite to preserve the said property for his said granddaughter and her issue independent of her husband and clear of his debts.

The testator also bequeathed shares in the *Pelican Life Insurance Company* for the benefit of his granddaughter *Ann Savage* and her issue, and shares in the *Stroud Canal Company* for the benefit of his granddaughter *Sarah Savage* and her issue, in terms corresponding with the bequest of the shares in the *Phœnix Fire Office*, and then directed that, as to the shares in the three concerns above mentioned, the same should be continued in his name as a deceased proprietor, or of his executors as representing him, until such settlements should be executed and the proceeds and advantages should be received by his executors upon the trusts above mentioned.

The testator then gave a leasehold house in the city of *London* to the executors upon similar trusts, with a slight variation in language, for the benefit of his granddaughter *Mary Ann Savage.*

And in case any or either of his said granddaughters should happen to die under the age of twenty-one years and without having been married, then he gave and bequeathed all the shares and provisions thereinbefore provided for his granddaughters so dying (amounting to or valued at £2500 each) to his said executors upon trust for his said other granddaughters or their issue, if any or either of them should be dead leaving issue. And he directed the same to be settled and secured to them and their issue, with the same powers, cautions, and authorities as were thereinbefore mentioned regarding their original portions; and if all his granddaughters should happen to die under the age of twenty-one years and without being married, then he directed all the said shares and property to sink into and become part of the residue of his personal estate.

The testator gave all his residuary personal estate in trust for the benefit of his daughter Mrs. *Savage* for life, as therein mentioned and from and after her death he gave to his four granddaughters £1000 each for their respective use, and not subject to any settle-

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ment whatever, to be a vested interest at the age of twenty-one or marriage, which should first happen, with benefit of survivorship in case of death before vesting, and the residue to his two grandsons equally, to be vested at the age of twenty-three years; and if either should die under that age without leaving issue, then upon trust for the other and his issue; and if both should die before their fortune should vest in them without issue, then he gave the whole of the fortune to his four granddaughters equally, to be vested in them when their original fortunes were directed to vest in them, and with similar benefit of survivorship as regarded their original fortunes; and he directed the same to be settled and secured on their marriage in a similar way to that which was thereinbefore directed regarding their original fortunes; and in the event of the death of all his said granddaughters before their fortunes should vest in them without leaving issue, then he gave the whole of their fortunes to his said two grandsons equally, to be vested in them when their original fortunes were directed to be vested, and with similar benefit of survivorship as regarded their original fortunes, and subject to the same condition of their taking the name of *Tyers*.

The testator died in 1866. The Plaintiffs in the special case were his two granddaughters, *Matilda* and *Mary Ann Savage*, both of whom were of advanced age and were unmarried; and the Defendants, his grandson *T. Tyers Tyers*, *J. Lucas*, the administrator of *J. Tyers Tyers*, deceased, and *Snowden*, the surviving trustee.

The questions submitted to the Court were:—

1. Whether the Plaintiff *Matilda Savage* had an absolute or what interest in, or any and what power of disposition over, the shares in the *Phœnix Fire Office*?

2. Whether the Defendants *T. T. Tyers* and *J. Lucas* had any and what interest in the same shares?

3. Whether the Plaintiff *Mary Ann Savage* had an absolute or what interest in, or power of disposition over, the leasehold premises?

4. Whether the Defendants *T. T. Tyers* and *J. Lucas* had any interest in the same property?

The Vice-Chancellor was of opinion that *Matilda* and *Mary Ann*

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Savage took life interests only in the respective bequests, with a power of appointment on marriage, subject to the direction for a settlement on their marriage with consent. From this decision the Plaintiffs appealed.

Mr. *Morgan*, Q.C., and Mr. *Heath*, for the Appellants:—

We contend that the two granddaughters are entitled to an absolute interest in their shares of the property. The will is incorrectly expressed; but as the trusts are executory, more latitude may be allowed in the interpretation of them. The testator sets aside a portion for each of his granddaughters till she attains the age of twenty-one or marries under that age; and if she marries with consent of guardians, which seems to imply marriage under twenty-one, the portion is to be settled on her and her children. This gives her an absolute interest by implication in the other event, namely, her attaining twenty-one without marrying: *Gardiner* v. *Stevens* (1); *Crofton* v. *Davies* (2). The testator places himself *in loco parentis* to his granddaughters. He speaks of the property given to each as the "provision" made for them. This implies that the *corpus* of the property is set apart for their benefit; and although the absolute interest is, in a certain event, to be cut down by the settlement, the property, so far as it is not subject to the settlement, is given to them: *Mayer* v. *Townsend* (3); *Lassence* v. *Tierney* (4); *In re Thomson's Trusts* (5). If the Court shall hold that the property did not vest absolutely in the granddaughters on their attaining twenty-one without being married, we contend that, if they now marry, they are entitled to a settlement which would give them an ultimate disposal of the fund in default of children.

Mr. *Joshua Williams*, Q.C., and Mr. *Nugent*, for the residuary legatees:—

The cases cited with respect to setting aside a portion for children have no application to this case, because there is no gift to the granddaughters at all, except the gift to them for life for their separate use. Where there is an express estate for life given, there can be no implication of an absolute interest. It is true that the testator refers to the benefit given to his granddaughters as the "provisions" made for them, and their "portions;" but those expressions are satisfied by the gift of the income to them, and the capital to their children, in the settlements which he directed to be made. The distinction which the testator draws between the £1000 which he gives his granddaughters absolutely out of the residue, and the property to be settled, shews that he did not contemplate the latter property vesting in them absolutely.

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(1) 30 L. J. (Ch.) 199.
(2) Law Rep. 4 C. P. 159.
(3) 3 Beav. 443.
(4) 1 Mac. & G. 551.
(5) Law Rep. 11 Eq. 146.

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Mr. *Owen*, for the trustee.

Mr. *Villiers* appeared for the purchaser of the leasehold interest, but as he was not a party to the special case, the Court declined to hear him.

Mr. *Heath*, in reply.

Jan. 16. LORD HATHERLEY, L.C.:—

In this case, which has been extremely well argued by Mr. *Heath*, both in following Mr. *Osborne Morgan* and in his reply, I have carefully looked through the will, and I cannot differ from Vice-Chancellor *Wickens* in his judgment. Perhaps if the testator had been more skilful in expressing his ideas the result might have been different from what it is; but we must, of course, adhere to his words; and his words are so plain that we cannot escape from the construction which has been settled by decided cases, so as to give *Matilda Savage* what she is desirous to have, namely, the absolute interest in the *Phœnix* shares.

The scheme of the will is peculiar. The testator begins by giving, first, an interest to his grandsons (whom he makes his executors) in certain property; and in certain events, which did not occur, he desires that that property should go over to his granddaughters in equal shares, and to be secured in the same manner as the other "provision" he has made for them. Now, Mr. *Heath* has argued that the testator placed himself *in loco*

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parentis—that this provision was an absolute portion for the granddaughters, and so the case would be brought within that class of authorities, of which *Mayer* v. *Townsend* (1) is an instance, where it has been held that, if you find an intent to dispose of the whole fund in favour of a given individual, that individual will not lose the benefit of the fund because it has been directed to be settled in a manner which gives him only an estate for life, and then passes it to his children without any ultimate limitation for his benefit; the principle of which is well explained by Lord *Cottenham* in *Lassence* v. *Tierney* (2). But if you do not find the actual gift of the whole fund, then it can only be taken in the mode in which the enjoyment is pointed out. I am afraid that the provision in this will does not constitute an actual gift sufficient for that purpose. What the testator has done with what he calls the subsequent provision is this: he seems to have been minded to make all his granddaughters equal, and to give a sum or property equivalent in value to a sum of £2500 to each. [His Lordship then read the clauses in the will stated above, and continued:—] The two granddaughters have both attained twenty-one, and are now very advanced in years, neither of them being married. That event in which it is given over has not happened. There is a residuary bequest, which of course carries everything which is not well given, and the question is, whether or not, under the whole of this will, and the additional circumstance which I shall presently state, the will is to be read as in the case of *Mayer* v. *Townsend*, namely, as the gift of a portion to each of the granddaughters, the whole fund to be settled, in the particular event of their marrying with the consent of the trustees or guardians, in the manner I have described, with a gift over in a given event, namely, of their dying under twenty-one and unmarried.

There is another circumstance at the end of the will which is also relied upon, which is this, that there is a gift—an actual, absolute gift—of £1000 out of the residue to the same daughters, which it is expressly declared shall be for their absolute interest, and without being settled in the manner that he has before directed as to their provision—again referring to it as being a "provision"

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(1) 3 Beav. 443.

(2) 1 Mac. & G. 551.

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for the daughters. Now, it is not inconsistent with its being a provision that they shall have a life interest, for if they marry under age, and have children, it is a provision for them. There is this further difficulty, that this sum to make up £2500 is only to be in the case of a settlement being made, which settlement, it appears to me, although that point cannot be decided upon this special case, is a settlement to be made only in the event of a marriage under age. This was very ingeniously put by Mr. *Heath*. He said that the trustees are directed, until the settlement is made, to hold upon the same trusts, and that that always implies the case of a settlement arising. But the case of a settlement is not to arise except in the event of their marrying under age; and I think that proviso is to meet the case of such a settlement being, from some cause, accidental or otherwise, postponed. But the direction to hold upon the same trusts does not apply to the case where no settlement is directed to be made at all. It was said it is a strained construction to say that this settlement is to be made only in a given case. Now, it appears to me that that is not so, because the testator might well conceive, if the daughter married under age, she would require the protection of trustees before the settlement could be made; but if she married after she attained her age, then she might be considered to be old enough to judge for herself, and to have her settlement made in such way as she might think fit. The testator did not think it necessary that he should direct that any such settlement should be made in that particular case.

Again, it was argued, upon the authority of *Gardiner* v. *Stevens* (1) and *Crofton* v. *Davies* (2) (where it was held that, if there is a direction to pay the rents and profits to a person until he attains twenty-five, and then over, but, in the event of his dying under twenty-five, then a gift of the absolute interest to somebody else, there is in such a case an implied gift of the absolute interest in the other event not spoken of, namely, of attaining twenty-five); that, in like manner, here there was to be an implied gift of the absolute interest in the event of the granddaughters surviving twenty-one. I am afraid that that will not help this

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(1) 30 L. J. (Ch.) 199. [illegible] (2) Law Rep. 4 C. P. 159.

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particular case, because there is an express limitation for life, and the gift over does not exactly correspond with the period for which the property is held in suspense, as it did in the cases cited; for this is not the case of a gift up to twenty-one, and, if they die under twenty-one, a gift over. The two events do not correspond. It is a gift for life, and in another collateral event, namely, dying under twenty-one and unmarried, then a gift over. Those cases, therefore, do not help the construction of the present limitation.

The Vice-Chancellor has put his judgment in very few words, and I shall do well to follow his example by saying that the testator has given an estate for life, and that that is their only present interest. Therefore I think that the declaration should be that the daughters take for life. I think that the special case goes too far in asking for a declaration as to future interest. The only declaration will be that the granddaughters are both entitled for their lives, subject to any question that may arise upon their marriage.

Solicitor for all parties: Mr. *Barker*.

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Jan. 17, 18.

KEMP *v.* SOUTH-EASTERN RAILWAY COMPANY.

[1869 K. 42.]

Railway—Duration of Agreement to take Land—Purposes of Railway—Evidence that Land is required.

19 Ch D 566
576
26 Ch D 340
565 & 570
578 & 580
2 Ch D 30, 40
45, 9

A landowner agreed with a railway company to sell them ten acres of land and one acre for a station, at a certain price, and that if the company should require more land for the station, or for any purpose, they should pay for the same at the rate of £100 per acre, and the agreement was to be supplemental to the *Lands Clauses Act*. The ten acres were paid for and conveyed. Before the compulsory powers of the company had expired they gave (apparently by mistake) notice to treat for three acres more, and before the time for completion had expired they took possession of these three acres, alleging that they required the land. They also took possession of some small pieces of land which were covered by earth slipped from the railway:—

Held, that, under the agreement, the company had power, until the expiration of the time limited for the completion of the railway, to take such land as they required for the purpose of a station or for slips of earth at £100 an acre.

The Court will accept as conclusive the evidence of the engineer in the service of the company as to the quantity of land required for the purposes of the railway, if the statement has a reasonable appearance of accuracy.

Decree of *Bacon*, V.C., reversed.

THE Defendants, the *South-Eastern Railway Company*, by the 8th, 9th, and 10th sections of the *South-Eastern Railway* (*Tunbridge and Dartford Lines, &c.*) *Act*, 1862 (25 & 26 Vict. c. xcvi.), passed on the 30th of June, 1862, and incorporating the Consolidation Acts, were, amongst other things, empowered to purchase lands by agreement for any of the extraordinary purposes specified in the *Railways Clauses Act*, 1845, connected with the railways. Their compulsory powers of purchasing land were not to be exercised after three years from the passing of the Act (the 30th of June, 1865), and the railway and works authorized by the Act were to be completed within five years from the passing of the Act (the 30th of June, 1867); and on the expiration of that period the compulsory powers granted to the company for making the same were to cease.

By a subsequent Act, the 30th Vict. c. cviii., entituled the *South-Eastern Railway* (*Capital*) *Act*, 1867, passed on the 12th of April, 1867, the period limited for the completion of the railway and works was extended to the period of one year after the passing of the Act.

On the 4th of September, 1863, an agreement was entered into between the *Norwich Reversionary Interest Society*, of the one part, and the *South-Eastern Railway Company*, of the other part, whereby it was witnessed that it was agreed the society should sell, and that the company should purchase, certain lands mentioned and described in the schedule, and containing ten acres, part of *The Mountains Estate*, at the price of £2000. The agreement contained, amongst others, the following clause:—

"The company shall erect and for ever maintain a passenger station upon the piece of land numbered 77 in the company's plan, and one acre of ground shall be considered as covered by the said sum of £2000 for the site and purposes of such station; and if the company shall require more than one acre of ground for the site or purposes of the said station, or any additional ground for any purpose beyond that specified in the said schedule hereto, they shall pay for the same at the rate of £100 per acre."

It was further provided that the agreement was to be taken as supplemental to, and not in substitution of, the *Lands Clauses Act*, and that any dispute or difference was to be settled by arbitration in the manner provided by that Act.

Upon the scheduled ten acres the company entered and constructed their line of railway, and the ten acres were conveyed to them in 1864.

The Mountains Estate contained about 200 acres; and by a deed dated the 15th of February, 1864, this estate was conveyed by the trustees of the society to the Plaintiff *Charles Fitch Kemp*, and afterwards became vested in the Plaintiffs *Kemp* and *Johnson*, subject to the provisions of the agreement with the railway company.

The company, on the 26th of May, 1865, served the Plaintiff *Johnson* with a notice, under their Acts and the Consolidation Acts, to treat for three acres of land, which adjoined the ten acres above mentioned. On the 1st of May, 1867, the company entered into possession of the three acres; and they also had taken possession of some land covered by earth which had slipped from an embankment.

The company afterwards built on part of the scheduled land a passenger station with approaches, called the *Hildenborough Station*.

In June, 1867, *Johnson*, on behalf of himself and *Kemp*, applied to Mr. *Freeland*, the solicitor of the company, and asked to have the value of the land taken by the company ascertained. To this application he received an answer signed "*John Freeland*, per *H. W. Porter*," stating that one acre for station purposes was included in the land for which the £2000 was paid, and that the company claimed the additional land taken by them at £100 an acre. Much other correspondence followed, usually conducted by *H. W. Porter*, who signed the letters "*H. W. Porter*, for law clerk;" and at one time, as the Plaintiff alleged, the company agreed to refer the compensation for the whole of the extra land to arbitration, under the *Lands Clauses Consolidation Act*. But on the 12th of July, 1869, *E. P. Cearns*, the then solicitor of the railway, wrote to

Johnson, claiming the land at £100 an acre, under the agreement of 1863, and stating that the only question for the arbitrators was the damage by severance.

On the 31st of July, 1869, *Kemp* and *Johnson* filed the bill in this suit against the company, alleging that the power of acquiring further land under the agreement did not extend beyond the expiration of their compulsory powers; that if the Court should hold that the powers of the company under the agreement were still exerciseable, the company were entitled to acquire at the rate of £100 an acre, in addition to the one acre, only a small quantity of land for a passenger station; and that the company had waived any rights they might have under the agreement; and the bill prayed an injunction to restrain the company from continuing in possession of the lands, except one acre, until the amount to be paid for the same, and for damage, should be ascertained by arbitration, according to the alleged agreement; or that that agreement might be rescinded, and possession of the land restored to the Plaintiffs, and the company ordered to pay damages.

The company, by their answer, said that the notice to treat had never been acted upon, because they were, under the agreement of 1863, entitled to have any land they might require, at £100 an acre; and that they had taken possession of the land, as they were about to construct a goods station. They denied that they were bound by the alleged agreement to refer, and alleged that the company wanted the land, as to certain small portions, for the purpose of making good accidental slips, and as to the rest, for a goods station.

The Plaintiffs produced evidence to shew that the company did not want the land for a goods station, and had not even begun the works. The manager of the company stated, in an affidavit, that the land was taken possession of by the company for the accommodation of goods and passenger traffic; that the passenger station had been built, but the construction of the goods station had been suspended, as the traffic had not developed so rapidly as they expected. The engineer of the company deposed that part of the land taken was covered by accidental slips of the railway, and that the land taken for a station was actually required to afford the necessary facilities for the contemplated traffic.

The Vice-Chancellor *Bacon* made a decree granting an injunction, and ordering the company to pay damages to be ascertained, and also the costs of the suit (1).

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(1) 1871. Nov. 17. WN(1871) 208

Sir James Bacon, V.C., said that upon the construction of the agreement the company had contended that they were to be at liberty, at any time, under any circumstances whatever, to take any land they might think proper belonging to the Plaintiffs, for the purposes of the railway generally.

If the only question before His Honour were upon the construction of the agreement, he should not so hold. He should not hold that it was in the contemplation of the parties, or that it was expressed by the words they had used, that this company, a perpetual corporation, were to be at liberty at any time to exercise the power of compulsorily taking from the owner any portion of land, however altered in circumstances it might be, which they in their judgment might think necessary for the general purposes of the railway.

But it was not merely upon the agreement that this case was to be decided. Assuming that the powers intended to be conferred by the agreement were as extensive as had been contended for, surely they must be exercised in such a manner as would entitle the company, if they were Plaintiffs, to ask for the specific performance of the agreement. Now, would this Court decree the specific performance of such an agreement as was said to exist in this case? Such a thing was wholly out of the question, and nothing so unreasonable would be done under the authority of this Court.

But, again, whatever might be the extent or meaning of the agreement, the parties claiming the benefit of it must claim that benefit within a reasonable time. More than that, they must not do anything which was wholly inconsistent with the agreement. Persons who had such a power as this clause gave to this railway company might relinquish or modify that power; but they could not do so of their own free will only, if by so doing they altered the status and interest of the persons with whom they were dealing.

Assuming, then, the power of the company to be that which they asserted, how was it to be explained that within a year and nine months from the date of this agreement they served a notice to treat under the Act of Parliament? That was a direct relinquishment of, and departure from, the agreement—no slip—no accident—no such thing as was suggested by the Lord Chancellor in his judgment in the case of the *Bedford Railway Company* v. *Stanley* (2 J. & H. 746)(1) no such thing as might induce the Court to endeavour to look with as much indulgence and leniency as it could upon such a transaction.

The railway company had a right, for their own purposes, to exercise this option, and to use the power which the Act of Parliament gave them. The notice to treat bound the owner, and against it the owner could not allege the agreement, and could not be heard to say anything. The case must go before a jury, and he must make out his case as well as he could. The company asserted, and had exercised, a right, which they said they possessed, of paying a less sum than the jury might award, if that award should exceed £100 per acre. This was very different from the case before the Lord Chancellor. So far from there having been any slip, or mistake, or misapprehen-

(1) SC 9 Jur NS. 152.

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The company appealed.

Mr. *Little*, Q.C., and Mr. *C. H. Turner*, for the Appellants:—

No doubt the notice to treat was a mistake; but it shewed what

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sion in the assertion of the company's rights, or anything that could entitle them to any sort of indulgence—if the Court were at liberty to extend any indulgence to them—it appeared that they did a most deliberate act; for just before the time when their powers of compulsory purchase under the Act of Parliament would expire, they gave notice, and acted upon that notice, to the extent of taking possession. [His Honour then stated the effect of the correspondence between the parties, and came to the conclusion that there was no fresh agreement which he could enforce.]

On the part of the company it had been argued that in the Act of Parliament there was a power of acquiring land for extraordinary purposes, and that that power carried a right to complete the purchase. But that contention involved a total departure from the agreement. Whatever the company's powers of acquiring land for extraordinary purposes might be, they could not be asserted but by means of a previous notice to treat. So that the argument was wholly inconsistent in the two branches of it, when it was said, on the one hand, that the Act of Parliament gave the company powers of acquiring land, and, on the other hand, that the notice to treat, which imposed upon the company the obligation of paying a price to be ascertained in a particular way, was of no operation.

A part of the case which had been much argued was, that this land was required by the company for the purpose of their railway. The House of Lords, in the case of *Stockton and Darlington Railway Company* v. *Brown* (9 H. L. C. 246)(a), did as much as they could to put an end to what His Honour thought a doubtful practice growing up in the Courts, of employing and delegating power to experts. In that case it was decided that the judgment of the railway company, provided that it was exercised *bonâ fide*, was to be the rule by which questions as to the requirements of the company were to be determined. His Honour had no inclination to dispute that; and had no right to dispute it, if he was inclined to do so; but upon the question of whether this land was required for the purposes of the line or was not, it was quite clear that the Defendants had made out no such case as should induce the Court to believe that they wanted it for any of the purposes of their railway. They took an acre of land; they pointed out in the agreement that an acre would probably be enough for the site and purposes of the station. Nobody now could doubt that an acre was abundantly enough for the station and the approaches.

The evidence upon this subject was of the most meagre and unsatisfactory kind that could be conceived; and the contention that that land was wanted for any purpose of the railway connected with the agreement wholly failed. It was quite clear that the company did not want it. But if they did want it, then they had not taken the right mode of acquiring it. They relied solely upon the agreement; and assuming, for a moment, that that agreement did give them a right to that land at the price of £100 an acre, still,

(a) S C 6 Jur N S 1168

lands were required. We took possession of them before the time for completion was expired, and we are therefore entitled to them under the agreement. We want the land for the purposes of our railway; and such cases as *Baker* v. *Metropolitan Railway Company* (1), *Richmond* v. *North London Railway Company* (2), have no bearing. *Bedford Railway Company* v. *Stanley* (3) was misunderstood by the Vice-Chancellor, and is, in fact, against his conclusion.

Mr. *Kay*, Q.C., and Mr. *Lawson*, for the Plaintiffs:—

We say, first, that the land is not really wanted by the company for the purposes of the railway, and is, therefore, not within the agreement; secondly, that they have waived the agreement; and thirdly, that the agreement cannot be construed to mean that they were at all times to have as much land as they chose to ask for. It meant that if they happened to want a little more than

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by serving the notice to treat, the company had wholly waived and departed from that agreement. Whatever their rights might be under those Acts, they might assert, but they were not entitled to retain possession of the land under the circumstances which existed.

His Honour thought that the conduct of the railway company had been eminently unfair, and the decree must be as asked for, that was to say, an injunction restraining them from remaining any longer in possession of land which was not theirs, and which they had no means of making theirs. There must also be an inquiry as to the damages to be paid by the company, and they must pay the costs of the suit.

The terms of the injunction as finally settled were, that the Defendants, their agents, &c., be restrained "from continuing in possession of the lands and hereditaments upon which they have so entered as aforesaid (other than and except such land as they shall mark out within a fortnight as one acre on which the passenger station has been erected as before mentioned), and from continuing to use the same for spoil banks, or otherwise converting the same in any manner to the purposes of the undertaking of the Defendants, the company, unless and until the amount to be paid to the Plaintiffs by the Defendants, the company, in respect of the said lands and hereditaments (other than and except as aforesaid) as the value thereof, and for compensation for damage thereto as aforesaid, shall have been ascertained by arbitration under the provisions of the *Lands Clauses Consolidation Act*, 1845." An inquiry was also directed as to damages, and the amount so assessed was ordered to be paid by the company, with the costs of the suit.

(1) 31 Beav. 504. 9 Jur. N.S. 61.

(2) Law Rep. 3 Ch. 679.

(3) 2 J. & H. 746. 9 Jur. N.S. 152.

the ten acres they were to have it at £100 an acre; but this they must be able to ascertain in a very short time, and they cannot have a right to take the land at any time. They do not, in fact, want this land, and cannot take it: *Flower* v. *London, Brighton, and South Coast Railway Company* (1). We are, however, content that they shall have the land under their notice to treat, paying, of course, the price fixed by arbitration or by a jury.

The LORD CHANCELLOR stated that he had no doubt that the company might have the land under the agreement, but could not have costs, as they had made such blunders. He wished to hear a reply as to the slips only.

Mr. *Little*, in reply, said that the company were willing, as to all the land covered by slips, and not included in the notice to treat, to apply to the Privy Council under 5 & 6 Vict. c. 55, s. 14, and to pay for the land so taken; the value to be fixed under that Act.

LORD HATHERLEY, L.C.:—

I am sorry that I am compelled to differ from the learned Vice-Chancellor as to the result of the blunders which have been made by the parties to this suit.

The agreement of 1863 does not seem to me open to the objection made and acceded to by the Vice-Chancellor, that the construction put upon it by the Defendants is unreasonable. [His Lordship then commented on the terms of the agreement, as shewing that the owner of the land wished to have a station, and that the £2000 to be given was to cover the ten acres and the acre wanted for a passenger station, and the damage by severance; and that if the company wanted more than an acre for their station and other purposes, they were to pay for it at the rate of £100 an acre.] I really cannot see how there can be any misapprehension as to the construction of that agreement. But then it was argued that it would be unreasonable to suppose that the landowners were going to bind themselves to sell at any time hereafter all or any part of their estate of 200 acres at this price of £100 per acre. It is said that this would be an extravagant supposition,

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(1) 2 Dr. & Sm. 330; 11 Jur. (N.S.) 406.

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because the land was intended to be built upon and would increase in value, and it could not be supposed that the Plaintiffs would give unlimited powers for all time over their whole 200 acres. But that is not a reasonable way of construing this agreement. The powers of the company do not extend to the 200 acres, or to anything like it, nor could any conceivable thing happen which, in this remote place, would give a power to the company to take for their purposes 200 acres, or any large portion of the land. If they ever proposed such a thing, or anything like it, the Court would say it was an absurdity, and that they had no power to do so.

It was, however, a very possible and a very conceivable thing that, wanting a passengers' station, they might thereafter want a goods station. There might also be slips, and if they occurred during the time their powers lasted, so that the company might require more land, and for such purposes, they would, under this agreement, be entitled to the land at the price of £100 an acre.

Then it was said that it is unreasonable that their powers should be unlimited in point of time. I hold distinctly that they are not unlimited in point of time. The agreement says, and I am not sure that I could not infer as much if it did not, that it is to be supplementary to the *Lands Clauses Act*, and not in substitution for it. The parties were making a bargain, and these are the supplemental provisions. Having the price fixed, and having determined upon a station, all the rest of the Act remained applicable; and, amongst other things, the time within which the works were to be made. This agreement would not run for all time, and merely fixed the price instead of leaving it to be settled by a jury or by arbitration—that is all. I cannot understand why it should be thought to be a roving agreement extending over 200 acres of land, or for an indefinite period of time.

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Then reading the agreement so, I hold that the company may, within the time within which they are to finish their works, have whatever land they want at £100 an acre. I say within that time, because a notice to treat given by a company is perfectly good so long as the company are empowered to carry into effect their works under the Act of Parliament, and no longer. It may be given the day before the compulsory powers to take the land

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expire, and then it will last until the time for which that land is wanted, namely, the time for making the works, has also expired, but no longer.

As to the land covered by slips, I hold that, whenever the company, during the time they had for the completion of their works, discovered that they wanted more land in consequence of miscalculations made by them in the execution of the works, that land would fall within the agreement, and would be paid for accordingly. Whatever they might afterwards want, they must take and pay for under the powers of the Act, 5 & 6 Vict. c. 55, s. 14, which authorizes the Lords of the Committee of the Privy Council to grant the requisite powers to railway companies when slips or similar accidents happen, and then the fair value of the land must be ascertained in the usual way, either by a jury or by arbitration.

Therefore, so far the whole matter seems plain, and if nothing else had happened, the course of the company would have been plain and simple; but the company began by a blunder in sending a notice to treat in the ordinary way. [His Lordship then stated the proceedings, and said that thereupon the landowner might have at once demanded £100 an acre.] This was entirely different from the case cited, *Bedford Railway Company* v. *Stanley* (1), where the agreement was on one side only, and I held that the company were not bound until they had accepted the terms offered by the landowners; and as they had not done so, that the landowners were not bound. Here it is a binding agreement between the landowner and the railway company, which either side had a right to insist upon. It is said, however, that the company was bound by this notice to treat, and so the Vice-Chancellor was induced to hold. That might be reasonable if more had not been done. But a great deal more was done, and evidently neither side considered this notice to treat as a regular notice to treat in the usual manner, for until 1867 neither party took a single step under the notice, except that the company took possession of the land—a very unreasonable action on their part, because they had not paid for it, and they were not to take possession until they had paid for it. [His Lordship then commented on the proceedings

(1) 2 J. & H. 746. 9 Jur N.S. 152,

and correspondence between the landowners and the company, and held that both sides had made mistakes, and that the company were not, under the circumstances, bound by the blunders of their clerk.]

So I have come to the conclusion, as I said before, that all the land wanted by the company beyond the one acre which they have already paid for, must be paid for at £100 per acre, with interest at £5 per cent., as it should have been paid for forthwith. Then as to the land covered by the slips, I think that as to the slips which have happened before the time for completing those works, that would be land wanted for the purpose of the railway, and would be within the agreement, for sale at £100 per acre. But any other land covered by slips will have to be taken at a price to be ascertained in the usual way.

I ought to have noticed one subject which was pressed in the argument, and which is of considerable general importance, namely, how far we are or are not bound by the engineer's evidence about lands being wanted for the purpose of the railway. The question hardly arises upon this appeal, because the Vice-Chancellor has decreed that when the company have ascertained the price to be paid for the land, they shall hold this very land in question; and I must assume that the Vice-Chancellor would not have ordered anything illegal. It would be illegal to order them to take land which was not wanted for the purpose of their railway. But independently of that consideration, I must say that the affidavits filed by the company seem to me quite sufficient for such a purpose as this. If they said that they might possibly want the whole 200 acres, that would be idle; but the company may want two or three acres for the purpose of a goods station, and the manager and engineer have sworn that the two or three acres were taken with a prospective view of making a station for the wants and necessities of the railway. I apprehend it is the duty of the company, and quite within their province, if they think there is a reasonable probability that such a station may be wanted, to secure the land for that purpose, and not to wait until their powers have expired. The company must calculate their wants according to the intention and objects of their scheme, and of the likelihood of a traffic coming. Those wants must be supplied within the limited time, and if their officers pledge their oaths that this is done with a view to a traffic likely to come, I think that is all the Court is authorized to look to, and the Court cannot speculate as to whether or not it is too much or too little, always subject to the jurisdiction of this Court, in any case of manifest fraud upon an agreement, or upon an Act of Parliament. As Vice-Chancellor *Kindersley*, in *Flower* v. *London, Brighton, and South Coast Railway Company* (1), said, the Court will not act upon the mere oath of an engineer that he wants so much, and there must be some appearance of probability before the Court will act upon it. I think that here the land may well be wanted for railway purposes. The owners are not adverse to sell at the increased price, and the Vice-Chancellor has ordered the land to be given, which I apprehend he never would have done if he thought it was for an illegal purpose. I think it very important that the principle laid down in the case of *Stockton and Darlington Railway Company* v. *Brown* (2) should be considered as settled, and that the Court should be saved from a deluge of affidavits as to whether land is wanted or not, by simply saying that the Court will take the engineer's word for it when he gives it with a reasonable appearance of accuracy.

Solicitor for the Plaintiffs: Mr. *J. H. Johnson.*
Solicitor for the Company: Mr. *Cearns.*

(1) 2 Dr. & Sm. 330; 11 Jur. (N. S.) 406.
(2) 9 H. L. C. 246; 6 Jur. (N. S.) 1168.

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BRIGGS *v.* UPTON.

[1871 B. 196.]

Settlement—Legal Representatives.

In a settlement the words "to pay to legal representatives in a due course of administration":—

Held, to amount to a direction to pay to next of kin, and not to executors or administrators.

Order of *Wickens*, V.C., affirmed.

BY an indenture of settlement dated the 2nd of June, 1825, made on the marriage of *Jane Briggs* with *John Upton*, after reciting that *Jane Briggs* was entitled, under the will of her father, to a reversion in fee, expectant on the death of her mother, in an undivided fourth part of certain hereditaments; that she was possessed of a sum of £1900 New Four per Cent. Annuities; and that upon the treaty for the marriage, and in order to make some provision for the said *Jane Briggs*, and for the issue of the marriage, it was agreed that the hereditaments and the annuities should be vested in *William Briggs* and *J. E. Upton*, their heirs, executors, administrators, and assigns, upon the trusts thereinafter expressed, it was witnessed that *Jane Briggs* conveyed to the trustees, their heirs and assigns, the share of the said *Jane Briggs* in the said hereditaments; and it was declared that the trustees should stand seised of the said one-fourth part of the said hereditaments upon trust, either in the lifetime of the mother, or as soon as conveniently might be after her decease, with the consent of *Jane Briggs*, if she should be then living, and if she should be then dead, then of their own proper authority, to sell the said share of the said hereditaments. And it was declared that the trustees should stand possessed of the sum of £1900 New Four per Cent. Annuities, and of the moneys to arise from such sale, upon trusts to invest as therein mentioned, and to pay the annual produce of the investments unto *Jane Briggs* and *John Upton* during their joint lives, and to the survivor of them during his or her life, and after the decease of such survivor to hold the same upon certain

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trusts for the benefit of the children and issue of *Jane Briggs* as she should by deed appoint, and in default of appointment, for the benefit of her children and issue. And it was further declared that in default of children or issue to take under the trusts above mentioned, the trustees should stand possessed of "the said trust moneys and premises, and the accumulated interest and dividends, in trust for such person or persons, and for such uses, intents, and purposes, and subject to such conditions, as she, the said *Jane Briggs* (party hereto), notwithstanding her intended or any future coverture or covertures, by any deed or instrument in writing, or by her last will and testament in writing, shall direct or appoint; and in default of such direction or appointment, then upon trust to pay or transfer the said trust moneys and premises unto the legal representatives of the said *Jane Briggs* (party hereto) in a due course of administration."

Part only of the deed was set out in the bill, but by consent the whole deed was taken to be before the Court, and it appeared that in several places in the deed the words "executors or administrators" were used in the technical sense; but in one place the word "representatives," and in another place the words "personal representatives," were used when the meaning would, in technical words, be expressed by "executors or administrators."

The marriage took place shortly after the date of the settlement. *Jane Briggs* (then *Jane Upton*) died in 1829 without issue, and without having exercised any of the powers reserved to her by the settlement. She left her husband her surviving; also her mother, a brother, a sister, and a nephew; and they were her only next of kin.

John Upton, in 1830, obtained a grant of letters of administration of the personal estate of *Jane Upton.*

Jane Briggs, the mother, died in 1847; and the share of *Jane Upton* in the real estate was sold in 1850 by the trustees of the settlement; and the proceeds of the sale, amounting to £562, were paid by them to *John Upton*, to whom the annuities had also been transferred, in the belief that *John Upton* took these sums under the settlement as administrator to his wife.

John Upton died in 1871, and the bill in this suit was then filed by *George Briggs*, one of the next of kin of *Jane Upton*, against the executors of *John Upton* and the surviving trustee of the marriage settlement, praying a declaration that the Plaintiff and the other next of kin of *Jane Upton* were, under the trusts of the settlement, entitled to the funds comprised therein.

The Defendants demurred for want of equity, and the Vice-Chancellor *Wickens* overruled the demurrer (1).

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(1) 1871. Nov. 20. WN(1871)201

SIR JOHN WICKENS, V.C.:—

I think that the true construction of the sentence is that the administration or disposition of the fund in question is vested in the trustees of the settlement, and not in the executors or administrators of the wife. That circumstance, and the further circumstance that the words "executors or administrators" are repeatedly used in the settlement, are, I think, sufficient to shew that the words "legal representatives" are not to be construed "executors or administrators." In fact, the substitution of these words for the existing words would make the sentence inaccurate. The question remains whether the construction to be adopted is person or persons who would have taken under the *Statute of Distributions*, excluding the husband, or person or persons who would be entitled to the personal estate if the wife had died intestate. This appears to me to be a question of great difficulty. Against the claim of the husband it is said, first, that as this is a marriage settlement, if it had been intended that he should take the whole if he had survived, it would probably have been so expressed; and, secondly, which is perhaps the same argument in another form, that to give effect to his claim would be equivalent to striking the clause out of the instrument. Further, it is said on behalf of the Plaintiff that the words "legal representatives" do not properly describe the husband in respect of his beneficial interest in his wife's property—a remark which derives weight from the way in which those words are used in the *Statute of Distributions*, and probably in some degree from the decision in *Robinson* v. *Smith* (6 Sim. 47). The words "in a due course of administration," it is suggested, point the same way. In the case of *Robinson* v. *Smith* reliance was placed by the Vice-Chancellor on the word "pay," as denoting that the husband of the lady, who was the trustee under the will, was not to take beneficially, since in that case he would "retain." But this remark would apply to the case of an appointment under the antecedent power, in which the word must necessarily have meant "pay or retain," since it could not have been intended to exclude the husband from the possibility of his being an appointee. A somewhat similar remark might be founded in this case on the plural "representatives," which must mean representative or representatives, but is, of course, not strictly applicable to the husband. Notwithstanding the criticism on the case of *Robinson* v. *Smith*, I think it is somewhat in the Plaintiff's favour. On the other side reliance is placed on the recital as shewing an absence of intention to benefit the next of kin, and the rights of the wife's antecedent creditors are suggested; but principally, and above all, reliance is placed on the absence of any such express words as are required to exclude the husband's *primâ facie* right. It might perhaps have been

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The Defendants appealed.

Mr. *Greene*, Q.C., Mr. *C. Hall*, and Mr. *Bagshawe*, for the Appellants:—

This was a settlement made on marriage, and was a contract between the husband and the wife; but no intention to exclude the husband from whatever he might obtain by his marital right is shewn. Executors or administrators is the primary meaning of the words "legal representatives," and why should any other meaning be given to them? In other parts of the settlement they bear that meaning. The words "in a due course of administration" shew the same intention; for who is to administer funds but an executor or administrator? If she had survived, and had made a will not in execution of the power, then her executors would have taken the property, and would have administered it in payment of her debts and otherwise. The cases, especially the later cases, are in favour of construing these words to mean executors and administrators: *Jennings* v. *Gallimore* (1); *Corbyn* v. *French* (2); *Bailey* v. *Wright* (3); *Saberton* v. *Skeels* (4); *Daniel* v. *Dudley* (5); *Allen* v. *Thorp* (6); *Kilner* v. *Leech* (7); *Hinchliffe* v. *Westwood* (8); *King* v. *Cleaveland* (9); *In re Henderson* (10); *In re Crawford's Trusts* (11); *In re Wyndham's Trusts* (12); *In re Grylls' Trusts* (13).

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further suggested that the Plaintiff's construction would exclude the rights of a second husband, which could hardly have been the intention. But it is not to be forgotten that the limitation in question is preceded by a power, and that although the settlement contemplates the possibility of a future marriage, the possibility of a second husband surviving the wife was likely to have been taken into consideration in framing the ultimate limitation in default of appointment. Upon the whole, and not denying the novelty and difficulty of the case, I have come to the conclusion that the Plaintiff's argument ought to prevail, and that the meaning of the words "legal representatives," as here used, is persons who would be beneficially entitled to the personal estate of Mrs. *Upton* if she had died intestate and unmarried. I therefore overrule the demurrer, and reserve the costs.

(1) 3 Ves. 146.
(2) 4 Ves. 418.
(3) 18 Ves. 49; 1 Sw. 39.
(4) 1 Russ. & My. 587.
(5) 1 Ph. 1.
(6) 7 Beav. 72.
(7) 10 Beav. 362.
(8) 2 De G. & Sm. 216.
(9) 4 De G. & J. 477.
(10) 28 Beav. 656.
(11) 2 Drew. 230; 18 Jur. 616.
(12) Law Rep. 1 Eq. 290.
(13) Ibid. 6 Eq. 589.

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Sir *Roundell Palmer*, Q.C., and Mr. *Chitty*, for the Plaintiff:—

We contend that there is an exhaustive declaration of the trusts, excluding the husband entirely. That was the object of the settlement. It never was intended to limit the ultimate trusts to the wife, as she had a power to dispose of the property by her will, and therefore it was needless to limit the property to her executors and administrators in order to give her a power of disposition. These are words of purchase and not of limitation. In other parts of the will, and where an estate is intended to go to the executors or administrators, it is so expressed. The words "in due course of administration" apply to the trustees of the settlement, and are a direction to them. If the whole was to go to the husband as administrator, there would be but one taker, and no due course of administration: *Squib* v. *Wyn* (1); *Elliot* v. *Collier* (2). The husband is not a next of kin within the *Statute of Distributions*. These words were held to mean next of kin in *Bridge* v. *Abbot* (3); *Watt* v. *Watt* (4); *Grafftey* v. *Humpage* (5); *Cotton* v. *Cotton* (6); *Milne* v. *Gilbart* (7); *In re Newton's Trusts* (8); *Robinson* v. *Smith* (9). If the intention was that the estate should go as contended for by the Defendants, why were the words "executors and administrators" not used? As to the theory that there was an intention to provide for the payment of the wife's debts, that is absurd, as the period is postponed until the death of the husband. *Baines* v. *Ottey* (10); *Bulmer* v. *Jay* (11); *Wilson* v. *Pilkington* (12), are very similar.

Mr. *Greene*, in reply:—

Cotton v. *Cotton* was a very difficult case, and was not intended to override the other authorities. *Bridge* v. *Abbot* was not a case of a husband as representative of his wife. In many cases there was a clear intention to distribute; but there is nothing

(1) 1 P. Wms. 378.
(2) 1 Ves. Sen. 15; 3 Atk. 526.
(3) 3 Bro. C. C. 224.
(4) 3 Ves. 244.
(5) 1 Beav. 46.
(6) 2 Beav. 67.
(7) 2 D. M. & G. 715; 5 D. M. & G. 510. 18 Jur 811,
(8) Law Rep. 4 Eq. 171.
(9) 6 Sim. 47.
(10) 1 My. & K. 465.
(11) 4 Sim. 48.
(12) 11 Jur. 537.

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of the kind here, and no reference to the statute. What is there to bring in the next of kin? We say that the words are words of limitation; but even if they are words of purchase, still the property goes to the husband as the administrator or personal representative.

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Jan. 29. Lord Hatherley, L.C., doubted if the heir ought not to be a party, in order to argue that the conversion was not out and out, and that he had a claim; as, however, the direction for conversion after the death of Mr. *Upton* was absolute, and as the case was on demurrer, His Lordship thought that the case ought not to stand over to amend by making the heir a party, and hearing what he had to say. His Lordship then stated the facts of the case, and continued:—

One observation which fell from the Vice-Chancellor was, that if he construed the words "legal representatives in a due course of administration" to mean "executors or administrators," then it would in truth be striking the words out of the will. I suppose the meaning of the Vice-Chancellor to be that, as the wife was the settlor, everything would have gone in the same way as if the words had been omitted; for there would have been a resulting trust, which would have had exactly the same effect as the construction he was asked to give to the words, namely, to carry the fund to the persons who would, through the medium of letters of administration, represent the wife. But though this might be so as to the personalty, it might not be exactly the case as to the realty; for if the wife had survived the husband there would be a question whether the real estate was converted, and then these words might have an effect.

But I quite agree with the Vice-Chancellor in thinking that the words "in a due course of administration" cannot be read as meaning that the trustees under the settlement were to pay it to the executors or administrators in order that they might make a due administration of the property. I think that the trustees are to pay the money to the persons, whoever they may be, who are fitly expressed by the terms "legal representatives in a due course of administration," The Vice-Chancellor has further said that throughout the settlement the terms "executors and administrators" are constantly used when those terms are required for the purpose of indicating the persons properly so described. It turns out, on examining the whole of the deed, not to be quite invariably so. The deed is inaccurately framed in a variety of ways, and in other places the words "personal representatives" are used where they obviously mean executors or administrators.

The construction that these words mean here next of kin is, I think, strengthened by referring to the disposal of the real estate. This is a marriage settlement in which the settlor, the lady, is disposing of both realty and personalty. To the realty, of course, the husband would not be entitled if no settlement at all had been made, except to a life interest as tenant by the courtesy. But she directs the two funds to be paid over as one to those persons who take under the ultimate limitations of the settlement. That is open to the observation which was made by Lord *Alvanley* in *Jennings* v. *Gallimore* (1), where the testator having a power used exactly the same expression as he had used in a previous settlement, and almost exactly the same as in this case. Lord *Alvanley* there said that the testator could not have intended the words in his will to mean nothing more than a gift to *William Gallimore*, to whom he gave the rest of his estate. And Lord *Alvanley* held that the property must go to the next of kin, stating distinctly that he decided upon the will and not upon the settlement. The limitation over was, however, in that case, not to the representatives of the wife; but probably *Ambrose Gallimore*, and not the wife, was the settlor.

Now I have weighed the cases which have been cited, and I have weighed the difficulties, some of which appear to present themselves to my mind more strongly than they did to the mind of the Vice-Chancellor; for, as I have stated in respect of two of his observations, I am not fortunate enough to concur in their force.

There still, however, remains the difficulty that this is a settlement of property in part of which the husband, independently of the settlement, could take no interest beyond a life estate as tenant

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(1) 3 Ves. 146, 148.

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by the courtesy; and this is limited over to the legal representatives of the wife in a due course of administration. According to the contention of the Defendants, if the wife made a will and appointed an executor, but only partially disposed of the property, then the rest would go to the husband. If, again, the wife died, and the husband took out administration, the whole would go to him; and if he died without having done so, some one else would take out administration to the wife, and would have to account to the administrator of the husband. So that according to the Defendants we must take her intention to have been that she, not knowing who her personal representatives might be, intended that the trustees were carefully to hand over the money to the persons, whoever they might be, who took out letters of administration to her estate.

I do not think that to be the natural meaning of the words. The natural meaning of the words would be, that the trustees were to pay it over to those who, in a due course of administration, beneficially represented her; and that, of course, would bring in the Statute with reference to the administration of intestates' estates.

In the *Statute of Distributions* the words "personal representatives" are used to mean children, and not executors or administrators—an argument which was relied upon in *Bridge* v. *Abbot* (1), and may, therefore, be used as a ground for fastening upon that expression the sense which is contended for in the present case.

We must consider the whole circumstances of the case, that it is a settlement, and that a husband is provided for in that settlement by having a life interest given to him, not only in the fund, which I may call naturally his own, but also in the real estate, in which he had no part or claim beyond the courtesy. And that being so, I think there is strong reason to conclude that the settlor intended by these words to indicate those persons who would, under the *Statute of Distributions*, be her representatives in point of beneficial interest, excluding the husband.

On the whole, I beg leave to use in this case the words used by Lord *Eldon* in a case before him, that the difficulties were very great on either side, and that, on the whole, he did not feel strongly

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(1) 3 Bro. C. C. 224, 227.

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enough impressed with the doubt on the one side as against the doubt on the other, to lead him to overrule the decision already come to. So I cannot take upon myself in this case of great difficulty to disturb the decision at which the Vice-Chancellor has arrived.

I confess that I have felt extreme difficulty upon the whole case; but I have come to the conclusion that I ought to affirm the decision.

Solicitors for the Plaintiff: Messrs. *Iliffé & Co.*
Solicitors for the Defendants: Messrs. *Few & Co.*

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[1861 B. 255.]

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S Ch/185

Power of Sale—Mortgage—Transfer of Mortgage—Destruction of Power.

In 1825, *D.* mortgaged an estate to *I.* in fee (subject, among other incumbrances, to an existing mortgage for £3000) to secure £27,000 payable at the end of twelve months, with interest in the meantime. The mortgage deed contained a power of sale providing that if default should be made in payment of the interest, or any part of it, for a month after any of the days appointed for payment, or in payment of the principal on the appointed day, then at any time thereafter, though no advantage should have been taken of any previous default, *I.*, his heirs or assigns, might sell. In 1830, *I.* having called for payment, a deed of transfer was executed to *K.* and *R.* This deed, after reciting that *I.* was entitled to the prior mortgage for £3000, recited the mortgage of 1825, and that "in the now reciting indenture a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be exercised," and recited the calling in of the mortgage moneys, and that *D.* had applied to *K.* and *R.* to discharge them, "which *K.* and *R.* have agreed to do on having the said sums so agreed to be advanced as aforesaid secured to them by an assignment of the said several securities hereinbefore recited, and generally in the manner hereinafter appearing." Then, in consideration of £30,000 paid to *I.* by *K.* and *R.*, *I.*, at the request of *D.*, assigned, and *I.* confirmed to *K.* and *R.*, the moneys due on the mortgages, "and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained." Then *I.* conveyed and *D.* confirmed to *K.* and *R.* in fee the mortgaged estates, subject to a proviso for redemption if *D.* should pay the principal of £30,000 on the day therein named, being at the expiration of seven years, and should in the meantime pay interest half-yearly on the days therein named. It was agreed that the money should remain on the security for seven years, *D.* not to be at liberty to pay it off sooner, and *K.* and *R.* not to call for payment sooner, unless default was made in payment of interest, or *D.* died. There was a power of sale to arise if default should be made in payment of the principal or interest contrary to the terms of the proviso for redemption; and a covenant by *K.* and *R.* that no sale of the property should be made without three months' notice. The persons claiming under *K.* and *R.* having put up the property for sale, the purchasers objected that the power of sale in the deed of 1825 was gone, and that the vendors could not make a good title as against mesne incumbrancers:—

Held (reversing the decision of the Master of the Rolls), that the power of sale in the mortgage of 1825 was still subsisting, and capable of being exercised.

THIS was an appeal from an order of the Master of the Rolls, so far as it declared a power of sale contained in a mortgage deed of the 15th of June, 1825, to have been extinguished.

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By an indenture of release dated the 15th of June, 1825, made between *Robert Foster Grant Dalton* (then *R. F. Grant*) of the first part, divers other persons of the next ten parts, and *Charles Ingram* of the twelfth part, and by a fine levied in pursuance of it, the *Ingoldsthorpe* and *Snettisham* estates were conveyed (subject, as regarded the *Ingoldsthorpe* estate, to a mortgage dated the 11th of January, 1785, for £15,000), to the use of *Charles Ingram* in fee, subject to a proviso for reconveyance to *Dalton* in fee on payment by him, his heirs, executors, administrators, or assigns, to *Ingram*, his executors, administrators, or assigns, of the sum of £27,000 on the 15th of June, 1826, and of interest as therein mentioned. This indenture contained a power of sale, which provided that if default should be made in payment of the interest of the £27,000, or any part thereof, for the space of one calendar month or upwards next after any of the days or times thereinbefore appointed for payment thereof, or default should be made in payment of the principal sum of £27,000 on the day thereinbefore appointed for payment of the same, then and in such case, or at any time thereafter, although no advantage should have been taken of any previous default, it should be lawful for *Ingram*, his heirs or assigns, to sell the mortgaged property, either together or in parcels, &c., &c. The power contained the usual clauses, except that there was no stipulation for giving notice before exercising it.

By an indenture dated the 23rd of July, 1827, the sum of £3000, part of the mortgage debt of £15,000, secured by the indenture of the 11th of January, 1785, was assigned to *Ingram* absolutely.

By an indenture of release dated the 2nd of July, 1830, grounded on a lease for a year, and made between *Ingram* of the first part, *R. F. G. Dalton* of the second part, and *Key* and *Richardson* of the third part, after reciting, among other things, the mortgage of the 11th of January, 1785, and after a recital of the deed of the 15th of June, 1825, concluding with " And in the said now reciting indenture a power or trust for sale is also contained for the better securing of the said principal sum and interest ; but the said power has not been and is not intended to be exercised," and after reciting the assignment to *Ingram* of the 23rd of July, 1827, and reciting that the said two sums of £3000 and £27,000 remained due to *Ingram* on his said securities, but that all interest for the same had been paid up at the date of the now stating deed, and that *Ingram* had applied to *Dalton* for payment of those sums, and that *Dalton*, not being provided with the means of paying them, had applied to *Key* and *Richardson* to discharge the same, "which the said *W. Key* and *E. Richardson* have agreed to do on having the said sums so agreed to be advanced as aforesaid secured to them by an assignment of the said several securities hereinbefore recited, and generally in the manner hereinafter appearing," it was witnessed that in pursuance of the said agreement, and in consideration of £30,000 paid by *Key* and *Richardson* to *Ingram* at the request of *Dalton* (the receipt of which was acknowledged in the usual form), *Ingram*, at the request of *Dalton*, granted and assigned, and *Dalton* confirmed to *Key* and *Richardson*, their executors, administrators, and assigns, the said principal sums of £3000 and £27,000, with all interest thenceforth to become due in respect of them, "And all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage and of every covenant and security therein respectively contained, To have, hold, receive, and take the said several principal sums unto and by the said *W. Key* and *E. Richardson*, and the survivor of them, his executors, administrators, and assigns, to and for their and his own proper use and benefit." Then by another witnessing part *Ingram*, at the request of *Dalton*, released, and *Dalton* confirmed to *Key* and *Richardson*, their heirs and assigns, the estates comprised in the mortgage securities and all the estate, right, title, interest, property, claim and demand of *Ingram* and *Dalton*, or either of them, of, in, to, and out of the same, "To have and to hold the said manors, messuages, &c., with their and every of their appurtenances, to the said *W. Key* and *E. Richardson*, their heirs and assigns, for ever, free from the several provisoes for redemption contained in all and every or any of the said indentures hereinbefore recited, subject nevertheless to the said in part recited indenture of mortgage of the 11th of January, 1785, and subject also to the proviso for redemption hereinafter contained." The proviso was to this effect: that if *Dalton*, his heirs, administrators, or assigns, should pay to *Key* and *Richardson*, or the survivor of them, his executors, administrators, or assigns, the sum of £30,000 on the 2nd of July, 1837, subject as thereinafter mentioned, and should also half-yearly, on the 2nd of January and July in every year, in the meantime and until payment of the principal, pay interest for the same at the rate of £5 per cent. per annum without any deductions, *Key* and *Richardson*, or the survivor of them, his heirs or assigns, would reconvey. There followed a proviso that the £30,000 should remain on this security for seven years, without any right on the part of *Dalton* or his representatives to pay it off sooner, and without any right on the part of *Key* and *Richardson* to foreclose or to call for payment within that period, subject to the further proviso that if default should be made in payment of the interest of the £30,000 or some part thereof, for the space of three calendar months from any one of the half-yearly days of payment, or if *Dalton* should die within the seven years, then it should be lawful for *Key* and *Richardson*, or the survivor of them, his executors, administrators, and assigns, if they or he should think fit, and should signify the same by some writing under his or their hand or hands, to call in the principal and interest within the seven years, as if the term of seven years had expired by lapse of time. There was a covenant for payment of the £30,000 following the terms of the proviso for redemption. There was a power of sale to arise "if default shall be made in payment of the said principal sum of £30,000, or the interest thereof, or any part thereof, contrary to the proviso or agreement for redemption hereinbefore contained," with an ample clause exonerating purchasers from seeing to the validity of the sale as regarded the giving of such notice as thereinafter was mentioned, or otherwise. At the end of the power was this covenant: "And each of them, the said *W. Key* and *E. Richardson*, doth by these presents for himself, &c., covenant with the said *R. F. G. Dalton*, his heirs and assigns, that no sale or sales, or notice of such sale or sales of the said hereditaments and premises, or of any part of the same, shall or may be made or given by the said *W. Key* and *E. Richardson*, or the survivors, &c., before or until he or they shall have given to the said *R. F. G. Dalton*, his heirs or assigns, or left with him or them at the last or most usual place of his or their residence or abode in *England*, three calendar months' notice in writing demanding payment of the money which at the end of the time shall be due to the said *W. Key* and *E. Richardson*, or the survivor, &c.,

and the said *R. F. G. Dalton*, his heirs or assigns, shall have made default in payment of the same at the end of three calendar months, to be computed from the delivery or service of such notice."

In the interval between the deeds of 1825 and 1830, *Dalton* had executed mortgages of the estate to other parties. He ultimately died insolvent.

The property was put up for sale by parties claiming under *Key* and *Richardson*, and was sold in lots. Some of the purchasers took the objection that the power of sale in the deed of June, 1825, was destroyed by the deed of July, 1830, and that a good title could not be made without the concurrence of the mesne incumbrancers. The parties interested in the £27,000 and £3000 thereupon filed their bill against the parties who claimed to be mesne incumbrancers, praying that it might be declared that the power of sale in the mortgage of 1825 was subsisting, and that the sales might be carried into effect, or if the Court should be of opinion that the power was not subsisting, then for foreclosure. The purchasers were not made parties, but appeared by counsel, and submitted to be bound.

The Master of the Rolls decided that the power of sale had been destroyed (1).

The priority of the Plaintiffs was not disputed, but the property having risen greatly in value since the contracts for sale were entered into, the mesne incumbrancers, whose security was scanty, were desirous that the sale should not be completed.

Sir *Roundell Palmer*, Q.C., Sir *R. Baggallay*, Q.C., and Mr. *Charles Parke*, for the Plaintiffs, in support of the appeal:—

We contend that the Master of the Rolls has erred in not giving effect to the express intention of the parties that the transferees should have all the powers and remedies which were vested in the transferor, and in controlling those plain words by inference from the recitals. The recital that the power had not been and was not intended to be exercised, which has been relied on, means in fair construction only this: that it had not been exercised, and that it was not intended to be exercised, except subject to the provisions of the transfer deed—not that it was not in any circumstances

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(1) Law Rep. 10 Eq. 482.

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to be exercised. The very expression that it was not intended to be exercised imports that it was still to exist. The next recital shews the intention that the transferees were to have all the powers of the deed of 1825. A new power of sale was of use because the old power only extended to the £27,000, not to the other £3000, so the giving it is not inconsistent with the transferees retaining the old one. It has been decided that the concurrence of the mortgagor in a transfer deed with a new proviso for redemption and covenant for payment does not extinguish the old power of sale: *Young* v. *Roberts* (1). The judgment in *Curling* v. *Shuttleworth* (2) is unintelligible. The operative part being clear, it is not to be departed from *ut res pereat: Carver* v. *Richards* (3); *Young* v. *Smith* (4). A clear operative part cannot be modified by a recital: *Wellesley* v. *Lord Mornington* (5).

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Chapman Barber*, for one of the mesne incumbrancers:—

We contend that there is no such rule as that a clear operative part cannot be controlled by a recital. The whole instrument must be looked at, and the intention of the parties collected from it. *Walsh* v. *Trevannion* (6) clearly shews this. The recital amounts to an agreement: *Rigby* v. *Great Western Railway Company* (7). The assignment of the powers is relied on; but the Appellants admit that it could not operate according to its terms; they say it was suspended, we say it was destroyed by its inconsistency with the present deed. The bargain here was, that the old power should be gone. It is objected that this gives an advantage to mesne incumbrancers, and no doubt it does; but so does the clause providing that the money shall not be called in for seven years. To recite the power of sale in this unusual way merely for the purpose of introducing a statement that it is not intended to be exercised, is inconsistent with the idea of keeping it on foot. The mortgagor had an object in getting rid of the old power, for it was exerciseable without notice. Mesne incumbrancers are not

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(1) 15 Beav. 558.
(2) 6 Bing. 121.
(3) 1 D. F. & J. 548, 561. 6 Jur N.S. 411.
(4) 35 Beav. 87. LR 1 Eq 100 - 11 Jur 763
(5) D. P., not reported.
(6) 16 Sim. 178; 15 Q. B. 733.
(7) 4 Railw. Cas. 175.

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alluded to in the deed, and it must be construed as if there had not been any. The new power requires three months' notice, so it is clear that it was intended to substitute one for the other.

[The Lord Justice Mellish:—May not the covenant not to sell without notice apply to both powers? It does not refer specifically to the later power.]

The scope of the deed shews that only the latter power is referred to.

[The Lord Justice Mellish:—Can the parties have intended to make a sale impossible without the consent of the mesne incumbrancers?]

Possibly not, but that only comes to this, that they made a bargain without foreseeing all its results.

Mr. *Bristowe*, Q.C., and Mr. *Phear*, for other mesne incumbrancers:—

We submit that there is no jurisdiction to make a mere declaratory decree that this power can be exercised without our consent: *Rooke* v. *Lord Kensington* (1).

Sir W. M. James, L.J.:—This objection appears to me a mere technicality. Subsequent incumbrancers stand very much in the position of *cestuis que trust*, and I see no objection to a bill being filed against them asking for a declaration that a sale will be good without their concurrence.

Sir G. Mellish, L.J., concurred.

Mr. *Schomberg*, Q.C., and Mr. *E. James*; Mr. *Kenyon*, Q.C., and Mr. *Haynes*; Mr. *Southgate*, Q.C., and Mr. *Nalder*; and Mr. *Owen*, for other parties.

Mr. *Batten*, for the purchasers, appeared and submitted to be bound.

Sir *Roundell Palmer*, in reply.

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(1) 2 K. & J. 753. 2 Jur N.S. 755.

Sir W. M. James, L.J.:—

We think that after the full argument which this case has undergone, it is not necessary to reserve our judgment. I am of opinion that too much effect has been given by the Master of the Rolls in his declaration to the words of the recital, that it was not intended that the power of sale should be exercised. It appears to me quite clear that apart from that recital there could have been no doubt whatever upon the intention of the parties with respect to the former securities. It is the common course of conveyancing, where a new mortgagee is advancing money for the purpose of paying off persons entitled to old securities, to take an assignment of all the existing mortgage debts, and also of all the securities, of all the remedies, of everything that the old mortgagees had, so as to keep them alive for the further security of himself as new mortgagee, in order that he may be protected against any intervening incumbrances which may have been made by the mortgagor in the interval between the dates of the two deeds. It being of course possible that the borrower may have created some mesne incumbrance, it is always considered prudent to take an assignment of everything then existing in the nature of security, not for the purpose of altering the bargain between the mortgagee and the mortgagor, but for the purpose of having an additional security for the performance of that bargain. In the present case, both sides having agreed that the mortgage should remain on foot for seven years, unless the mortgagor made default in payment of interest or died in the interval, nothing was to be done, no power was to be exercised, no remedy was to be resorted to, and no right was to be enforced, except in conformity with the terms of this new bargain, and with due regard to the rights of the mortgagor under it. There is in this nothing that is inconsistent with the subsistence of the old powers, and in my judgment the argument drawn from the final recital is unanswerable, that the new mortgagees have stipulated for, and have obtained as the price of their advance of the money, that the old mortgage debts and mortgage securities should be kept alive for their security. That being so, it would require something very precise and clear in any of the previous recitals or expressions in the deed to control the operative part of it, or to affect the precisely expressed agreement contained

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in the final recital, which is afterwards carried into effect by the operative part. Now, are those words, "but the said power has not been and is not intended to be exercised," fairly capable of an interpretation consistent with the good faith and honesty of the deed. It appears to me that they are, as they may be understood to mean that the power has not been exercised, and it is not intended to be exercised at present, or for a certain time, or in any manner inconsistent with the stipulations of this contract, or with the intention of the parties. This intention is carried into effect by a covenant, which, it appears to me, according to its true and fair and plain meaning, extends to prohibit any sale under the old power, or under any power the mortgagees might have, except upon three months' notice; and another clause prohibits the calling for payment, for a term of seven years, unless on default by or death of the mortgagor; which would extend to any remedy which the mortgagees might have sought to enforce against the mortgagor—a clause which the Court would have enforced against the mortgagee so long as the mortgagor was living and not in default.

That being so, I am of opinion that the recital of the intention does not amount to an agreement between the parties that the power is never to be exercised. It imports no more in my judgment than that the power is not to be exercised in the manner in which, independently of that recital, it would have been, but only as a collateral security for the purpose of giving effect to the security thereby expressed to be effected.

I am, therefore, of opinion that the declaration of the Master of the Rolls, that the power of sale is no longer subsisting, ought to be varied, and a declaration substituted for it, that the power of sale is still subsisting, and capable of being carried into effect.

Sir G. Mellish, L.J.:—

I am of the same opinion. The sole question, to my mind, is, whether the general scope and object of the deed is controlled by the recital, because, independently of the recital, I do not think any reasonable doubt can be entertained that the object of the parties, as shewn by the entire deed, was, that the whole of the existing securities should be kept alive, not, of course, for the purpose of being immediately enforced, but should be kept alive as a collateral security, if necessary, for the purpose of the security intended to be effected by the deed itself. The object of keeping alive such old securities obviously is to prevent any persons who may be mesne incumbrancers between the date of the old mortgage and the date of the present mortgage from obtaining any rights which may prejudice the security. It appears to me very irrational to suppose that any new mortgagees advancing money for the purpose of paying off an old mortgage, and taking an assignment of that old mortgage, should not have every right which the old mortgagees had, so far as those rights are consistent with the terms on which the money is advanced under the new mortgage.

The whole question turns, as it seems to me, on the meaning of the recitals. I quite agree that although the clause in question is only in the recitals, and not in the operative part of the deed, still if it had in unambiguous terms stated that the power was never to be exercised—if, instead of being "has not been and is not intended to be exercised," it had been "has not been and is agreed not to be exercised," or "has not been and is not to be exercised" —I should have thought that that would have amounted to an agreement that it should never be exercised; and although I might have thought it strange that mortgagees advancing their money should consent to such a clause, yet if I found the clause there I should have felt bound to give effect to it. But the literal meaning of the words does not import that. All that the words literally import is, that the power has not been exercised, and that there is no present intention of exercising it; and although I quite admit that if from the whole scope and context of the deed it could be seen that the intention was that the power should not be exercised, the words "is not intended to be exercised" might be sufficient to constitute an agreement that it never should be exercised, yet I think they ought not to be so construed unless we can see from the whole scope and context of the deed that that which is not the literal meaning must have been the intention of the parties. In my opinion, the whole scope and context of the deed prove it to be very improbable that such was the intention of the parties, and shew, on the contrary, that the intention was to keep the old securities alive for the purpose of affording additional

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security. I asked the Solicitor-General whether he could suggest that any harm would be done to the mortgagor by that construction, or whether the mortgagor could have had any object in making an express bargain that the old power should not be kept alive. I do not think that any answer was given to that question, and I cannot see that the mortgagor could have had any possible personal object in making a stipulation that the old power should not be kept alive. The old incumbrances clearly were kept alive so as to have precedence over the mesne incumbrancers, who, as it was not denied, might be foreclosed, and practically shut out. There could, therefore, be no possible object in confining the power of sale of the new mortgagees so as to make it ineffectual as against subsequent incumbrancers, whom they had undoubted power to foreclose.

Solicitors: Messrs. *Parke & Pollock;* Messrs. *Coverdale & Co.;* Messrs. *Oliver;* Mr. *T. Gill*, jun.; Messrs. *Shoubridge;* Messrs. *Powell, Thompson, & Groom;* Messrs. *C. & J. Allen & Sons.*

HEMMING *v.* MADDICK.

[1868 H. 273.]

L. JJ.
1872
March 8.

Practice—Evidence—Admissibility—Statement made by a Witness inconsistent with his Affidavit—Purchase of Shares in name of a Trustee—Suit by Liquidator in name of Contributory for Indemnity.

A witness, who made an affidavit on behalf of the Plaintiff, had previously made a statement, which the solicitor for the Defendant had taken down in writing, and alleged to be inconsistent with his affidavit. The solicitor filed an affidavit on behalf of the Defendant, and made this statement an exhibit:—

Held, that the exhibit was not admissible in evidence.

The right of a trustee, in whose name shares in a company were standing at the time of its being wound up, to indemnity from his *cestui que trust*, enforced by the liquidator in a suit in the name of the trustee who had compromised with the liquidator for his liability on the shares upon terms including a stipulation that the liquidator should be at liberty to continue the suit.

Decree of *Malins*, V.C., affirmed.

13 Eq 571
2 Ch D. 59
605
19 Ch D

THIS was an appeal from a decree of Vice-Chancellor *Malins*, in a suit instituted by the registered owner of 250 shares in *Frederick*

Symons & Company, Limited, a company established under the *Companies Act,* 1862, for the purpose of obtaining an indemnity from the Defendant, who was alleged in the bill to be the real owner of the shares.

The company was registered on the 9th of November, 1865, with a capital of £120,000 in 12000 shares of £10 each, of which £1 was to be paid on application and the remainder on allotment. In December, 1865, 8000 shares having been applied for, it was required, in order to obtain a settling day on the *Stock Exchange,* that 1000 more shares should be taken up. Accordingly, an arrangement was made by which each of four persons, of whom the Plaintiff was one, agreed, in consideration of twenty-five guineas, to apply for 250 shares, and the Defendant agreed to pay the application and allotment money. The Defendant accordingly paid the twenty-five guineas to the Plaintiff and the other three persons, and also the application and allotment money, and the shares were applied for and allotted to them. The Plaintiff, at the same time, executed a transfer in blank, which he gave to the Defendant, and the transfer was afterwards filled up with the name of a transferee; but the directors refused to register the transfer, and the Plaintiff's name remained on the register. The company was ordered to be wound up on the 15th of December, 1866, and the Plaintiff, after being placed on the list of contributories, commenced this suit for indemnity. Subsequently he assigned to the liquidator, as part of a general compromise of his liability as contributory, the right to continue this suit in his name (1). The Defendant contended that the Plaintiff and the other three persons undertook the whole risk of the shares after payment of the allotment money, and both parties entered into evidence on the question.

The Vice-Chancellor held that there was an implied agreement by the Defendant to indemnify the Plaintiff, and granted the relief prayed. The Defendant appealed from this decision.

Mr. *W. T. Jennings,* who negotiated the matter between the Plaintiff and the Defendant, made an affidavit for the Plaintiff on the 9th of April, 1870, in which he stated as follows:—

"There was no understanding whatever between us that the four nominees should incur any liability. On the contrary, the understanding between us was that the transfers should be executed and registered immediately, and that the nominees would then be relieved from all responsibility whatever."

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(1) See *Hemming* v. *Maddick,* Law Rep. 9 Eq. 175.

Mr. *A. T. Cox*, the solicitor for the Defendant, made an affidavit, in which he said:—

"Since the institution of this suit, and on or about the 26th of January, 1869, I saw *W. T. Jennings*, a print of whose affidavit, filed in this suit on the 8th of April, 1870, I have read. I inquired of him particularly as to the facts and circumstances referred to in the Plaintiff's bill, and at the time I took down in writing from his own lips a statement, which he signed in my presence, and which is now produced and shewn to me, and marked with the letter Z. I believe the said exhibit to contain a true record of what the said *W. T. Jennings* then said to me, partly in answer to my inquiries and partly of his own accord."

The exhibit Z contained the following statement:—

"Mr. *Maddick* agreed to give me a certain sum of 100 guineas. I said I could get four people to apply, and I did get them, and the 100 guineas was twenty-five guineas a piece. It was understood that the parties were to take all the risk of becoming shareholders. Of course it was for that the twenty-five guineas was paid them: they were not to have twenty-five guineas for nothing."

The exhibit Z was admitted on the hearing before the Vice-Chancellor, no objection having been made to its reception, and was entered in the decree; but on the counsel for the Defendant proposing to read it before the Lords Justices, it was objected to by the Plaintiff.

Mr. *Higgins*, Q.C. (Mr. *Glasse*, Q.C., with him), for the Appellant.

Mr. *Cotton*, Q.C., and Mr. *A. T. Watson*, for the Plaintiff.

The LORDS JUSTICES were of opinion that the statement was inadmissible as evidence, and ought not to have been admitted at the hearing. The only purpose for which it could be used was to

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discredit the witness who made it; and if it were to be used for that purpose, the witness ought to have been cross-examined, and then the document might have been put into his hand, and he might have been questioned about it.

At the conclusion of the arguments on behalf of the Appellant,

The LORDS JUSTICES, without calling on the Plaintiff's counsel, held that the trust was clearly established, and that the Plaintiff was entitled to an indemnity against calls. The appeal was therefore dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Linklater, Hackwood, & Co.*
Solicitor for the Defendant: Mr. *A. T. Cox.*

L. JJ.
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March 12, 13.

COOPER *v.* KYNOCK.

[1871 C. 91.]

Estate of Trustee—Rule in Shelley's Case.

7ChD. 20[illegible],2

Land was conveyed to a trustee, his heirs and assigns, to certain uses; and after the determination of those uses, to the use of the trustee, his heirs and assigns, upon trust to receive the rents and profits and pay them to *A.*, a married woman, for her separate use, and after the determination of that estate to stand seised of the said land, to such uses and upon such trusts as *A.* should by will appoint, and in default of appointment, to the use of the heirs and assigns of *A.*:—

Held (reversing the decision of the Master of the Rolls), that (though the construction might be otherwise on a will) the trustee took the legal estate in fee, and that *A.* took an equitable estate for life, with an equitable remainder to her heirs and assigns, which two estates united according to the rule in *Shelley's Case* (1), and gave her the equitable estate in fee.

BY an indenture bearing date the 10th of November, 1841, and made between *Charles Smith*, of the first part, *Mary Smith*, of the second part, *Ebenezer Cooper*, of the third part, and *Benjamin Smith*, of the fourth part (being an indenture made in contemplation of the marriage of *Mary Smith*, and also by way of an arrangement between *Charles Smith* and *Mary Smith*) *Charles Smith* granted and released unto the said *Benjamin Smith*, his heirs and assigns, certain messuages and lands at *Stockwell*, to have and to hold the said lands, messuages, and hereditaments, to the uses upon the trusts and under and subject to the provisions, conditions, and limitations thereinafter contained of and concerning the same: (that is to say) to the use of *Charles Smith* and his assigns during his life, and after his death to the use of his widow and her assigns during her life; and the deed proceeded, "and from and after the determination of that estate, then, in case the said *Mary Smith* shall be discovert, to the use of the said *Mary Smith*, her heirs and assigns for ever; but in case (which event happened) the said *Mary Smith* shall happen to be then a married woman, then to the use of the said *B. Smith*, his heirs and assigns, upon trust to take and receive the rents, issues, and profits of the said lands and hereditaments hereby released, or otherwise assured, or intended so to be, when and so often as the same shall become due and payable, and to pay the same when so received into the only proper hands of the said *Mary Smith* for and during her natural life, to and for her sole and separate use, wholly independent and free from the control of her husband, and so that her receipt alone shall be a good discharge to the said *B. Smith*, or the trustees or trustee for the time being acting under these presents for the payment of the same; and from and after the determination of that estate to stand seised of the said lands and hereditaments to such uses and upon such trusts as the said *Mary Smith*, notwithstanding her coverture, shall, by her last will and testament duly executed as by law required, direct, limit, and appoint; and in default of any such direction or appointment, or so far as the same, if made, shall not extend or be effectual, to the use of the heirs and assigns of the said *Mary Smith* for ever." The deed then contained a release from *Mary Smith* as to a sum of £2000; and further contained a proviso that in case the trusts thereby created should take effect by reason of *Mary Smith* being under coverture, then it should be lawful for *Benjamin Smith*, or the trustee or trustees for the time being acting in the execution of the trusts of the deed, to retain out of the rents his reasonable costs; and that it should be lawful for *B. Smith*, or the trustee or trustees so acting as aforesaid, by and with the consent of *Mary Smith*, notwith-

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(1) 1 Rep. 93.

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standing her coverture, to grant leases as therein mentioned. Also a proviso giving power to *Mary Smith*, notwithstanding her coverture, by any instrument under her hand, to appoint new trustees. Also a proviso that, in case, during the continuance of the trusts thereby created and the coverture of the said *Mary Smith*, she should be desirous of raising any sum of money for the advancement of her children, then it should be lawful for her to direct *B. Smith*, his heirs or assigns, or the trustees or trustee for the time being acting as aforesaid, to raise any sum not exceeding £1000 for that purpose.

Mary Smith was married to *E. Cooper* soon after the date of the above-mentioned deed. *Charles Smith* and his widow, and also *E. Cooper*, were dead.

Mary Cooper (in the deed called *Mary Smith*) contracted to sell the property comprised in the deed, claiming to have the equitable estate in fee simple, inasmuch as her life estate and her estate in remainder united according to the rule in *Shelley's Case* (1). The purchaser took the objection that her life estate was equitable, and the remainder was legal as a use executed under the statute; that the estates, therefore, did not unite; and that her appointees or heirs would come in as purchasers.

Mary Cooper thereupon filed a bill for specific performance. The Master of the Rolls dismissed the bill with costs (2).

The Plaintiff appealed.

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(1) 1 Rep. 93.

(2) 1872. Jan. 15. WN(72)8

Lord Romilly, M.R. (after reading the principal clauses in the deed):—

The question here is, is the estate for life to *Mary Smith*, the Plaintiff, of the same quality as the ultimate remainder to her heirs? Now, here it is clear that the life estate of *Mary Smith* is an equitable estate, and that during the life of *Mary Smith* the legal estate is vested in *Benjamin Smith*, the trustee. But does the legal estate extend beyond the determination of the life estate of *Mary Smith*? The answer to this question is to be found in the clear intention of the parties appearing within the four corners of the deed. This intention will be carried into effect, and the only control over it is necessary obedience to the established rules of law. In every way that I look at this deed I can see no intention to continue the estate in the trustee beyond the life of *Mary Smith*. The words I have read shew that, after the death of the Plaintiff, the trustee is to stand seised of the hereditaments to such uses and upon such trusts as *Mary Smith* shall by will direct; that is, to the uses and trusts —not trusts created by this deed, but to the uses and trusts created by the will of *Mary Smith*, and in default of

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Mr. *C. Hall*, and Mr. *Whitehorne*, for the Appellant:—

It is possible that, if this was a will, the limitations would be differently construed; but it is a deed, in construing which the legal meaning of words must be taken: *Wykham* v. *Wykham* (1); *Parkhurst* v. *Smith* (2); *Sand.* on Uses (3). A grant to a trustee and his heirs gives him the legal estate: *Colmore* v. *Tyndall* (4); *Venables* v. *Morris* (5); *Lewis* v. *Rees* (6). The case was very different in *Curtis* v. *Price* (7) and in *Doe* v. *Hicks* (8). There is in this deed a clear grant to trustees and their heirs, and that must mean an

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her creating any such uses and trusts, then not in trust for the heirs and assigns of *Mary Smith*, or for any one, but to the use of the heirs and assigns of *Mary Smith.* This, I think, limits the estate of the trustees, and makes it determine on the decease of *Mary Smith.* Then I look through the rest of the deed, and I find in it no provisions which require the estate in the trustees to extend beyond the life of *Mary Smith.* The first clause is to release *Charles Smith*, the father, from all claim by *Mary Smith* on account of any money lent, and particularly from any claim in respect of £2000. The next proviso gives power to the trustees to retain out of the rents of the hereditaments all costs and charges they may be put to respecting the trusts, and also to grant leases for fourteen years. This is limited to the trusts taking effect by reason of *Mary Smith* being under coverture at the decease of the survivor of her father and his wife. It is true that the lease so granted may extend beyond the life of *Mary Smith*, but the power to grant the lease is clearly confined to her coverture. The next is a power to appoint new trustees, but this is confined to *Mary Smith* herself, notwithstanding her coverture. The next clause is the usual clause for the indemnity of the trustees, and then comes a power to the trustees to raise portions for the children of *Mary Smith*; but this also is confined to the coverture of *Mary Smith*, and to be done by her direction, and is confined to £1000, and ceases with her coverture. The rest of the deed consists of the usual covenants by the father that he has a good title, that he has done no act to incumber, and also a covenant for further assurance, and there the deed ends. I think the object and intention of the deed was to create trusts to last during the life of *Mary Smith*, and to give the trustees an estate sufficient to enable them to execute these trusts, and that the determination of the estate mentioned in the deed was the decease of the Plaintiff, after which the estates created by her will, or vested in her heirs-at-law, were, or were intended to be, legal estates. At all events, if I am wrong in this view of the case, it is clear that, entertaining the view I do, it is much too doubtful for me to compel a purchaser to take a title depending on such a question.

(1) 18 Ves. 395.
(2) Willes, 332.
(3) Vol. i. p. 272.
(4) 2 Y. & J. 605.
(5) 7 T. R. 438.
(6) 3 K. & J. 132; 3 Jur. (N.S.) 12.
(7) 12 Ves. 89.
(8) 7 T. R. 433.

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estate to them in fee. If the deed, as in *Curtis* v. *Price*, contains anything absolutely inconsistent with that construction, the deed may be construed differently; but the inconsistency must be complete. On any other principle, in every settlement we should be obliged to speculate whether the estate given to the trustees was really in fee. As to the words "stand seised," these are constantly used when the legal estate is outstanding, and are not exclusively applicable to the legal estate.

Sir *R. Baggallay*, Q.C., and Mr. *Bedwell*, for the Defendant:—

At all events this case is not clear, and it would be wrong to compel a purchaser to take and pay for an estate, leaving him exposed to an ejectment. The wrong done to him would be very great; whereas there is no harm in leaving the vendor in possession of such estate as she has. No doubt the grant to a man, his heirs and assigns, carries the fee, but it may be cut down, as in *Doe* v. *Hicks* (1). The words are equivalent to confining the estate of the trustees to the life of *Mary Smith*. Why should it be continued? If the intention had been that the trustee should continue so after her death, the words would have been very different. There is nothing in the powers given by the deed which requires the trust to continue after the life of *Mary Smith*; in fact, the power to appoint new trustees is expressly confined to her life. If the rule in *Shelley's Case* (2) was intended to apply, she and her husband could, during the coverture, have sold and conveyed; but clearly the intention was that they should not. Any other construction cuts out the power to appoint by will. Why did the settlors take the trouble of having this deed if the result was simply to vest the legal estate in trustees, and to leave it to be dealt with as the wife and husband chose.

Sir W. M. James, L.J.:—

The question in this case depends upon the construction of a deed, the material words in which are these:—[His Lordship then read the limitations of uses in the deed.]

The Master of the Rolls thought that the trustee had not an estate in fee. His general proposition was that he did not find any indication of an intention to continue the legal estate in the trustee beyond the life of *Mary Smith*, applying, as I conceive, to this deed the rules and principles which have been applied to wills. But there are several decisions of the Courts refusing to apply those rules to deeds. In particular, cases have been cited to us in which the very same question has arisen upon limitations to trustees and their heirs to preserve contingent remainders, and in these cases that limitation has been held to give them an estate in fee simple.

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(1) 7 T. R. 433.

(2) 1 Rep. 93.

Now if there is any case in which the Court would cut down the meaning of the words " heirs and assigns," it would be precisely the case of such a legal technicality as an estate given to trustees to preserve, and in no case could a limitation of the estate of the trustee be more reasonably implied. But it has never been so held, except in the case of *Curtis* v. *Price* (1), which stands by itself, and in which the limitation to trustees to preserve was followed by the creation of a term in themselves of 100 years. This was held to be so contradictory that the estate of the trustee must, by necessary implication, be limited. But in every other case the conclusion has been different. In *Lewis* v. *Rees* (2), the present Lord Chancellor, when Vice-Chancellor, delivered a very elaborate judgment, considering all the cases, and came to the conclusion that he could not cut down the estate in fee which had been given in the first instance to the trustees, and that in a deed the legal construction of the words could not be varied by the implied intent.

To say that anything but equitable estates are given in this deed after the limitation to "the use of *B. Smith*, his heirs, and assigns," would be in effect to overrule all the decisions on the *Statute of Uses*, that where you have a limitation to a trustee, his heirs and assigns, to the use of the trustee, his heirs and assigns, the first use is executed, and the subsequent limitations only operate to give equitable estates.

Here the limitations over are limitations of trusts after a use executed by the statute, and the true construction of this deed appears to me to be conclusively settled by the authorities.

I find in the judgment of the Master of the Rolls no reference

(1) 12 Ves. 89.

(2) 3 K. & J. 132; 3 Jur. (N. S.) 12.

to the cases in which that broad distinction (too late now to be questioned) has been held to exist between the construction of these words in a will and in a deed.

This is, in my opinion, the construction to be put upon this part of the deed, without reference to any other part; and it seems to me that all the provisions of the deed are perfectly capable of taking effect if the subsequent estates are deemed equitable estates.

Then can we say that this is a case of such doubt that the vendor can never dispose of his land? In my opinion no Court of Law will ever question our decision that the limitation to the use of a trustee and his heirs, for the separate use of a married woman, is to receive the same construction as the limitation to the use of trustees to preserve contingent remainders has received. I see no such doubt in this case as will induce the Court to refuse specific performance.

Sir G. Mellish, L.J.:—

I am of the same opinion. We are to construe the words of this deed, and we find a conveyance to *Benjamin Smith*, his heirs and assigns, to the use of *Benjamin Smith*, his heirs and assigns. Now, beyond all question, these words, taken by themselves, give *Benjamin Smith* an estate in fee simple. Then the conveyance goes on to declare a trust for *Mary Smith* for her life, with words as to her separate use, which merely shew what the trusts were. The deed then says, "And from and after the determination of that estate." Now this, as has been admitted, does not mean the determination of the estate of the trustee, but must mean the determination of the estate of *Mary Smith*, which is an equitable estate; therefore the deed professes in these words to give the limitations over after the equitable estate.

Then the words are, "to stand seised," which words do not affect the question, for it would be absurd to hold that there is any inconsistency in saying that, having given *Benjamin Smith* the fee simple, he is, after the equitable estate for life has determined, to stand seised upon certain other trusts. [His Lordship then read the remaining words of the limitation.]

It appears to me that, beyond all question, the whole limitation

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is to the use of *Benjamin Smith*, his heirs and assigns, in trust for *Mary Smith* during her life, and after her death to the use of or in trust for such persons as she shall by will appoint, and in default, for her heirs and assigns.

It is impossible to hold that *Benjamin Smith* has not that legal estate, without holding that there may be a use upon a use.

I doubt whether any intention which you could collect from other parts of the deed would be sufficient to control these limitations unless you found some important inconsistency or contradiction which would compel you to put a different construction upon the words. I cannot, however, find in the rest of this deed anything to shew that such was not the intention of the parties. The general object of the deed was to give *Mary Smith*, as far as possible, the complete control over the property. There is no limitation to any one else, and it is clear that the words "her heirs and assigns" were inserted for the purpose of enlarging her estate. The words as to her will do not deprive her of anything, but were intended, as she would be a married woman, to give her nevertheless power to dispose of the estate by will. Even if the words could be modified, I cannot find anything in the rest of the deed which would have that effect, and I am satisfied that we are carrying into effect the intention of the parties to the deed by holding that the trustee took the legal estate in fee.

The decree of the Master of the Rolls must be reversed, and a decree will be made for specific performance.

Solicitors for the Plaintiff: Messrs. *Budd & Co.*
Solicitors for the Defendant: Messrs. *Sheffield & Sons.*

L. JJ.
1872
March 13.

NESHAM *v.* SELBY.

[1870 N. 60.]

Agreement for Lease—Letter—Memorandum in Writing—Statute of Frauds.

6 Ch D. 154.
156,

The Plaintiff, in a bill for specific performance of an agreement to take a lease of a house, alleged and produced evidence of a verbal agreement which was denied by the Defendant. In order to take the case out of the *Statute of Frauds*, the Plaintiff relied on a letter written by the Defendant, in which the Defendant agreed to take the house for seven years on certain terms, but in which the day of the commencement of the lease was not mentioned; and on another letter from the Defendant mentioning the day of commencement, and adding terms to which the Plaintiff did not agree:—

Held, that there was no memorandum of agreement sufficient to satisfy the requirements of the *Statute of Frauds*.

Decree of the Master of the Rolls affirmed.

THIS was a suit for the specific performance of an agreement to let a house, and the only question was, whether there was a memorandum in writing of the agreement sufficient to take the case out of the *Statute of Frauds*.

According to the case of the Plaintiff, a verbal agreement for letting a house for a term of seven years, to commence at the Michaelmas following, was come to between the Plaintiff and the Defendant at an interview on the 19th of March, 1870. After the interview the Defendant wrote and gave to the Plaintiff a letter containing these words: "I agree to take *Cronstadt House* for the term of seven years, on lease, subject to the condition of terminating at six months in the event of my death, at the rent of £120 per annum, on its being put into proper and tenantable repair." On the following day the Defendant wrote a long letter to the Plaintiff, mentioning that the lease was to begin at Michaelmas, and specifying a considerable number of repairs and alterations which he should require. The Plaintiff answered, not accepting all the terms contained in the Defendant's letter. The Defendant finally, on the 5th of April, refused to accept the lease, and the bill in this suit was then filed. The Plaintiff had, on the 20th of March, obtained a specification of repairs, and soon afterwards signed a contract with a builder for the repairs, which were completed in

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July, but did not include everything which the Defendant had required. The Defendant denied that a verbal agreement had been made as set up by the Plaintiff.

The Master of the Rolls dismissed the bill with costs, as reported (1), where the facts are fully stated.

The Plaintiff appealed.

Mr. *Dauney* (Mr. *Southgate*, Q.C., with him), for the Appellant:—

We have a complete verbal agreement, of which the letter of the 19th of March is sufficient evidence to comply with the requirements of the *Statute of Frauds*. The only deficiency in that letter is, that the day when the lease was to commence is not stated, and that date we obtain from the Defendant's letter on the following day. We can supply that deficiency without accepting the other terms of the letter: *Warner* v. *Willington* (2); *Bailey* v. *Sweeting* (3). If the beginning of the lease had been stated in the letter, there would have been a complete agreement; and with that omission supplied, the letter constitutes a complete agreement. The rest of the Defendant's letter is merely putting his construction on the agreement to repair, and asking for something relating to another house.

[The LORD JUSTICE MELLISH:—How does it appear that the Plaintiff accepted the offer contained in the letter of the 19th of March?]

All that is wanted is a writing by the party to be charged. It is not necessary that the other party should sign anything. The Plaintiff began immediately to act upon the agreement, and now asks for specific performance.

Mr. *Fry*, Q.C., and Mr. *A. T. Watson*, for the Defendant, were not called upon.

SIR W. M. JAMES, L.J.:—

In this case the Plaintiff has filed a bill on an agreement evidenced by letters. It is admitted that the first letter does not

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(1) Law Rep. 13 Eq. 191.
(2) 3 Drew. 523; 2 Jur. (N.S.) 433.
(3) 9 C. B. (N.S.) 843.

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contain all the terms of the alleged agreement. The omitted term is said to be evidenced by a second letter. But that letter shews that the understanding of the Defendant as to the agreement was different from that of the Plaintiff. Then the whole thing is broken off before the Plaintiff has bound himself to anything, and the Plaintiff was never placed in any difficulty by the agreement being broken off. I think that the Court has gone quite far enough in decreeing specific performance upon letters as constituting agreements, where one side is bound and the other not.

In my opinion this appeal must be dismissed.

Sir G. Mellish, L.J.:—I agree.

Solicitors: Messrs. *Pearson & Lee*; Messrs. *Aldridge & Thorn.*

PHILLIPS *v.* GREAT WESTERN RAILWAY COMPANY.

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April 15, 17.

[1871 P. 161.]

Railway Company—Stopping Trains—Express Trains—Control.

A railway company covenanted with the builders of refreshment rooms at a station on the line of railway that all trains which should pass the station carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, should stop for a reasonable period of about ten minutes. The Postmaster-General, proceeding under an Act of Parliament which was passed before the covenant was made, required the company to run a train carrying mails at a certain hour, and stopping at the station for five minutes only:—

Held (reversing the order of *Wickens*, V.C.), that such a train was a train "not under the control of the company" within the meaning of the exception.

BY a lease dated the 18th of December, 1841, the *Great Western Railway Company*, in consideration of the expense incurred by *J. D. Rigby* and *C. Rigby*, in the erection of refreshment rooms at the *Swindon* station, demised to *J. D. Rigby* and *C. Rigby* the said rooms and certain other buildings for the term of ninety-nine years at an annual rent of 1*d*. The lease contained many stipulations and agreements between the railway company and Messrs. *Rigby*, one of which was as follows:

"And it is hereby declared to be the intention of the said company, and the understanding of the said *J. D. Rigby* and *C. Rigby*, that in consequence of the outlay to be incurred by them in erecting the said refreshment rooms at *Swindon*, and preparing such other works as aforesaid, the company shall give every facility to the said *J. D. Rigby* and *C. Rigby* for enabling them to obtain an adequate return by means of the rents and profits to be derived from the said refreshment rooms, and that all trains carrying passengers, not being goods trains, or trains to be sent express or for special purposes, and except trains not under the control of the *Great Western Railway Company*, which shall pass the *Swindon* station, either up or down, shall, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes; and that as far as the company can influence the same, trains not under their control shall be induced to stop for the like purpose, and the company engage not to do any act which shall have an effect contrary to the above intention."

The interest of Messrs. *Rigby* under this lease was in August, 1848, assigned to *J. R. Phillips*, the Plaintiff in this suit.

In the year 1846 the company started trains from *Paddington* which did not stop at *Swindon* station, and the bill in *Rigby* v. *Great Western Railway Company* was then filed by Messrs. *Rigby* to compel the company to stop the trains; as reported (1).

The suit was compromised, and since that time the trains had stopped ten minutes at *Swindon* station, with the exception of certain night mail trains, which Mr. *Phillips* did not require to stop, as they were not profitable.

In April, 1871, a proposition was made by the manager of the company that one of the day trains should stop five minutes only, but this was refused by Mr. *Phillips*.

For many years a fast train carrying mails, and called by the company an express train, had run from *Paddington* to *Bristol* every morning. It had sometimes started a little earlier or a little later, but latterly had started at 9.15.

On the 20th of October, 1871, a letter was sent by Mr. *Benthall*, an officer in the Post Office, to the manager of the railway, stating that five minutes would be sufficient for the day mail trains to stop, and that a legal notice to that effect would be sent to the company; and other correspondence on the subject passed between the officers of the Post Office and the company. Beginning from the 1st of November, after the receipt of this letter, the 9.15 train was timed to stop, and did stop, five minutes only at *Swindon*, but the formal notice required by Act of Parliament, as mentioned below, was not sent by the Post Office to the company until the 13th of November, when a formal notice was sent, requiring that after the 12th of December the mails and letter bags should be conveyed either by ordinary trains or by special trains, under such regulations as were therein mentioned, which were (amongst others), that a train should leave *Paddington* at 9.15 A.M., reach *Swindon* at 11.10, and leave it at 11.15; and that a train should leave *Bristol* at 2.45 P.M., reach *Swindon* at 4, and leave it at 4.5.

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(1) 2 Ph. 44; 4 Railw. Cas. 175, 491.

The Plaintiff filed the original bill in this suit to restrain the company, so long as these regulations remained in force, from running the 9.15 train as a passenger train. The original bill was filed before the formal notice had been served by the Post Office, and was afterwards amended accordingly.

The Acts under which the Post Office made the requisition were said to be 1 & 2 Vict. c. 98 (1) and 31 & 32 Vict. c. 119 (2).

The Plaintiff moved for an injunction according to the prayer of his bill, and after several proceedings on the motion, the Vice-Chancellor *Wickens* granted an injunction restraining the company from carrying any passengers other than their own guards, servants, and officers, and the guards, servants, and officers of the Post Office by any of their trains appointed to run at stated times,

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(1) Sect. 1. "That in all cases of railways already made, or in progress, or to be hereafter made within the *United Kingdom*, by which passengers or goods shall be conveyed in or upon carriages drawn or impelled by the power of steam, or by any locomotive or stationary engines, or animal, or other power whatever, it shall be lawful for the Postmaster General, by notice in writing under his hand delivered to the company of proprietors of any such railway, to require that the mails or post letter bags shall from and after the day to be named in any such notice (being not less than twenty-eight days from the delivery thereof) be conveyed and forwarded by such company on their railway, either by the ordinary trains of carriages or by special trains, as need may be, at such hours or times in the day or night as the Postmaster General shall direct, together with the guards appointed and employed by the Postmaster General in charge thereof, and any other officers of the Post Office;" and that the company "shall receive, take up, deliver, and leave such mails or post letter bags, guards, and officers at such places in the line of such railway, on such days, at such hours or times in the day or night, and subject to all such reasonable regulations and restrictions as to speed of travelling, places, times, and duration of stoppages and times of arrival as the Postmaster-General shall in that behalf from time to time direct."

By sect. 6 provision was made for the remuneration of the railway company by the Postmaster-General for the conveyance of the mails, &c., to be determined by arbitration.

(2) Sect. 36. "Whenever, in pursuance of any notice under the Act of the session of the first and second years of the reign of Her present Majesty, chapter ninety-eight, 'to provide for the conveyance of mails by railways,' or otherwise, the mails or post letter bags are conveyed and forwarded by a company on their railway by a special train, the Postmoster-General may, by the same or any other notice in writing, require that the whole of such special train shall be appropriated to the service of the Post Office, exclusively of all other traffic, except such as he may sanction, and the remuneration to be paid for such service shall be settled as prescribed by the sixth section of that Act."

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which might be lawfully required to stop at *Swindon* station for any shorter time than a reasonable period of about ten minutes (1).

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(1) 1872. Feb. 8. WN(1872)36

SIR J. WICKENS, V.C., said that the contract on which the Plaintiff relied had been already acted upon by the Court in a way which, for the present purpose, relieved His Honour from discussing it, although a superior Court might not be relieved from all questions as to its validity on grounds of public policy, or otherwise, and as to its being such a covenant as the Court could not enforce by injunction. The decision on the former occasion also afforded some guide to the construction of the contract, and His Honour desired not to be understood as intimating any opinion with respect to what would be his view in the present case if *Rigby* v. *Great Western Railway Company* had not been decided. There was this difference between the cases, that *Rigby* was the covenantee, whereas the Plaintiff in this case was only the assignee of the lease, and not expressly the assignee of the covenant. This argument of course would be conclusive, if, as had been suggested, the covenant was personal to the *Rigbys*. But this seemed opposed to the whole tenor of the instrument. If the covenant were not personal, it was necessarily assignable, and the *Rigbys*, when they assigned the lease, became in this Court trustees of the covenant (supposing it to be a question of covenant) for the present Plaintiff. Therefore the objection would, in fact, resolve itself into an objection for want of parties, which would be immaterial for the present purpose.

His Honour then stated the facts of the case, and commented on the terms of the covenant, giving it as his opinion that the words "express train," as there used, meant a train sent for a special purpose and not an ordinary passenger train. It had been argued that the later Act put a construction on those words, but that argument was not tenable, for that Act did not make every train carrying the mail a special train, and if it did it would hardly give the word a new meaning, for the purpose of construing a private agreement made many years before the Act was passed. It was not easy to say with absolute certainty what particular trains were referred to in the exception; but the negative clause might well have been inserted with reference to future events, and even to future legislation. It might be contemplated that the *Great Western Railway Company* might find it even to their interest to give to other companies running powers over that part of their line, and the exception might refer to trains so to be run.

The covenant was framed as a general covenant, that all trains carrying passengers should stop, with an exception that the company should not be bound to stop trains which were not their trains. But His Honour did not think it absolutely necessary to define what that meant, for the question was whether this particular train was actually under the company's control or not?

Now, the Postmaster-General had a right to direct that a train should run for the mails under certain stipulations with regard to time, and he had, in fact, directed trains to run accordingly; but he had not directed, and could not direct, that those trains should carry passengers. This was a thing for the company to consider, having regard, amongst other things, to the Plaintiff's rights. To say, that because the railway company habitually started a passenger train at 9.15 in the morning and

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The company appealed, and on the appeal the motion was by consent treated as a motion for decree.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Mackeson*, Q.C. (Mr. *H. A. Giffard* with them), for the Appellants:—

The Vice-Chancellor thought himself bound by the decisions in *Rigby* v. *Great Western Railway Company* (1). We say that the word "express" means "express," and not "special," and that when the agreement was made, the intention was that ordinary trains only should stop, and not fast or express trains. Otherwise the covenant would be against public policy.

But we also say that we have no control over these trains, for the Postmaster-General has, under 1 & 2 Vict. c. 98, and 31 & 32 Vict. c. 119, power to prevent us from letting the train stop. The Act of 1 & 2 Vict. was in existence when the lease was made, and the provisions of that Act were probably in the view of the parties. What other meaning can be given to the provision as to trains not under the control of the company? It so happens that, as the *Great Western Railway* is on the broad guage, no company has running powers over it, nor did the provision contemplate trains drawn by engines belonging to strangers, as by that time such trains could not be run. The provision must have contemplated some interference by the government or by an enemy. The only meaning which the words will bear is that the company will stop all the trains which they can stop, not those which they cannot. The

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the Postmaster-General directed the mail train to start at that time, he therefore took all existing passenger trains under his control, was an abuse of terms. The notice was carefully framed so as to insist on the mail being carried at certain times, leaving the mode of doing so to the company entirely. The Postmaster-General had a right to require that there should be, daily, trains to and from *Bristol* not stopping at *Swindon* more than five minutes; and the Plaintiff had a right to require that no passenger train should pass *Swindon* without stopping ten minutes. These rights were not conflicting, though the assertion of both might inconvenience the company, and might even throw an additional burden on the Post Office, that is, on the public at large; but that would not relieve the company from their contract or deprive the Plaintiff of his rights under it, and the Plaintiff was entitled to what he in substance asked for.

(1) 2 Ph. 44; 10 Jur. 488, 531; 14 M. & W. 811; 4 Railw. Cas. 175, 190, 491.

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company has no wish to evade the covenant, but here the company is powerless. The Vice-Chancellor has held that though the Postmaster-General may compel the company to run a train, the company may not attach passenger carriages to it. But there is no such bargain as that, and if there were, it would be against public policy. As to the power of the Court to compel trains to stop, *Hood* v. *North Eastern Railway Company* (1) is a recent authority. At all events, the balance of inconvenience is against the injunction, and the Plaintiff may well be compensated by damages.

Sir *Roundell Palmer*, Q.C., Mr. *Morgan*, Q.C., and Mr. *Cookson*, for the Plaintiff:—

[They were stopped as to the question of public policy.]

As to leaving the Plaintiff to his remedy at law, the rule of this Court is that with a definite covenant the Plaintiff will not be left to obtain mere damages: *Tipping* v. *Eckersley* (2).

At the time when this lease was made, an express train meant what we now call a special train, and not merely a fast train. The Postmaster-General may order trains to be run, but the company cannot utilise his powers to evade their contract. If he chose to run twenty trains a day the Plaintiff would lose all the benefit of his contract. The question is whether this train is under the control of the company. We say that it is; it is driven by the company's servants, and if an accident happened the company would be liable. As soon as the company attach carriages the train comes under their control. The Postmaster-General has nothing to do with the train, except to see that the letters are properly carried, and if he forces the company to run a train without passengers he, or rather the public, will have to pay for it. It was said that the expense would be £40 a day; but if so the Postmaster-General would probably discover that the saving of five minutes was not worth the money, and would allow the train to stop. No doubt the words in the lease were introduced with reference to trains which might be run by other companies over the line. It is true that a fast train has for many years started from *Paddington* at 9.15 or 9.30; but the Postmaster-General

(1) Law Rep. 5 Ch. 525.

(2) 2 K. & J. 264.

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has no power to select that or any other train to carry the mails, and can only order them to be carried by some train at a particular hour, and if the company are willing to carry the mails by a special train he must be content. The company for their own convenience choose to carry the mails by a passenger train, and must take the consequences. Messrs. *Rigby* spent a large sum on the faith of this lease, and the property of the Plaintiff, who has succeeded them, will be put in peril. The company deliberately entered into the contract, and must not evade it. Goods trains are not required to stop, but if passenger carriages were attached they would become passenger trains, and must stop. At all events the company were in the wrong, for they began on the 1st of November to run trains without stopping, whereas, they were not, until after the filing of the bill, compelled by the notice to do so.

LORD HATHERLEY, L.C. :—

The question in this case turns upon a few words in an instrument made in the year 1841.

The object of Messrs. *Rigby*, who had at an expense of £25,000 built refreshment rooms, and made their arrangements for supplying refreshments to travellers on the *Great Western Railway*, was that they should have an opportunity of obtaining customers, which opportunity could only be afforded by sufficient leisure being given for the passengers to stop at these refreshment rooms, and take such refreshments as Messrs. *Rigby* would offer them. Accordingly, a covenant was entered into upon which there has been much litigation, but which seems to us by no means difficult or obscure in construction, though it is not altogether in artistic language. [His Lordship then read and commented on the words of the covenant.] With certain exceptions, all the passenger trains are to stop, the important exception being "trains not under their control," which in common sense must mean those which the company cannot control in the matter of stopping. The circumstance that the company have the control over them in other ways, for instance as to the hour of starting, as to the rate of speed, and so forth, has nothing whatever to do with it; and in order to bring the train within the exception it must be under the control of the company at the point to which the covenant refers. What did it signify to the builder of the rooms whether the company could control the train for the whole way down to *Didcot*, and no further, or whether the company could control the conduct of the guards, and the places at which the train should stop on other parts of the line, or the rate of speed at which it should travel? All that was perfectly indifferent to Messrs. *Rigby*, for all that they wanted was the passengers to have ten minutes in which they could come into the refreshment room to eat and drink. [His Lordship then commented further on the terms of the deed, and said that the parties might have foreseen a variety of cases that might occur after the date of the deed.] But at the date of the deed the Postmaster-General had the power of saying how long the train that carried the mail bags should stop at any given station. Such a train the Postmaster-General could order the company to send, and it must consist of an engine and tender, and of a carriage for the bags, and for the Post Office servants, over which I hold, for the purposes of the covenant, that the company have no control at all as to the period of stoppage. Then I hold further that there is nothing in the covenant which prevents their hooking on to that train carriages containing passengers, and then it becomes one of the trains contemplated by this covenant, namely, a train containing passengers, but not under the control of the company for the purpose of stoppage. I apprehend that there is in the covenant nothing which says that passengers shall not go by this train, because the Postmaster-General has given this order. The company may be bound to try and induce the Postmaster-General to change his mind, and that I am told has been done. If there had been any collusion with the Postmaster-General, or if there had been the slightest suspicion that the company wished to escape from their contract, the matter would have assumed a different aspect in equity, and we could have proceeded upon that ground.

The injunction which the Vice-Chancellor has granted seems to involve an extension of the covenant to cases not within the contemplation of the parties to the deed.

As to the costs, it is true that the train had been altered before the formal notice was given, but the Postmaster-General had expressed his intention to give the notice, under which circumstances the Plaintiff would be entitled to damages only, and not to an injunction. The question of costs has been left in our hands, and we think that if no damages are claimed, in dismissing this bill we shall dismiss it without costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion. The question turns upon the construction of the covenant, which is somewhat curiously worded; for, after reciting what the intentions of the parties were, it contains a covenant by the company that they will do nothing which should have an effect contrary to those intentions. That, perhaps, is not quite the same thing as a covenant to do the things themselves, because, if the company were prevented by *vis major*, or by something entirely beyond their own control, from performing the contract, then the covenant would not be broken; whereas, if there is a contract to do a thing, although a man is prevented from doing it, nevertheless he must pay the damages. Therefore there might possibly be a difference; but for the purpose of determining this case, it appears to me that the covenant must be taken as if it was a positive covenant that the thing should be done. It deals with all trains carrying passengers, and I will take it to be a covenant that all trains carrying passengers should stop, but with exceptions; and then the entire question is, whether this train comes within the exceptions.

Now, does it come within the exception of trains to be sent express? In my opinion it does not. I do not differ from the judgment of Vice-Chancellor *Wigram* in *Rigby* v. *Great Western Railway Company* (1), that "express" does not there mean what are now ordinarily called "express trains," but means trains sent under some special agreement. Then is it a train "for special purposes?" That, I think, is a good deal more doubtful, though I conceive that, this having been a train which had run for a great many years as an ordinary passenger train, at or very nearly at the time at which it now runs, it could hardly be called a train running for a special purpose. It may serve to illustrate the meaning of the covenant if we suppose there had been no train starting at this time, and that the Postmaster-General had given an order that the

(1) 10 Jur. 488; 4 Railw. Cas. 175, 183.

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Great Western Railway Company should run a train carrying mails, starting from *Paddington* at this particular time, arriving at *Swindon* at a particular time, and remaining at *Swindon* five minutes and no longer. I think that such a train would have been a train for a special purpose; but I cannot see that there is anything in this covenant to prevent the company from adding passenger carriages to that train for the purpose of diminishing the expense. If they were not prevented from carrying passengers, they would be entitled to receive a reasonable sum, which, I presume, would be only such a sum as they ought to receive upon the assumption that they carried passengers. Therefore, in that case, if there had been no train starting at this time, I think that the train would be a train for a special purpose, by which the company might carry passengers if they chose.

Assuming, however, that this is not a train for a special purpose, because it was an ordinary train that had been running for a great many years, still the Postmaster-General sent his order, and ordered, in fact, that the train which started at that time, and arrived at *Swindon* at the usual time, should only stop five minutes at *Swindon;* and that order he is by Act of Parliament entitled to give.

Then the question is, whether this is a train under the control of the company with reference to stopping or not stopping at *Swindon?* It appears clear to my mind that it is not under their control, because it can only stop as long as the Postmaster-General allows it to be stopped.

Now, it is not denied that so far as the train carries the mail-bags, and the letters and the servants of the Postmaster-General, it cannot stop; but the argument on the other side, and the main argument, was, that the order of the Postmaster-General only applied to that portion of the train which carried the mails and the officers of the Post Office, and that there was nothing in his order to prevent the carriages carrying the passengers from stopping. But what is a train? There is nothing to shew that the company is to split the train into two parts. The train which arrives at the *Swindon* station is an entire train consisting of the carriages of the Postmaster-General and of other carriages carrying passengers, and this particular train, as it arrives at *Swindon,* is obliged, by order of the Postmaster-General, to leave within five minutes. I cannot see that there is anything in this covenant which obliges the company to divide the train into two—possibly at a smaller expense than if they had originally started two trains from *Paddington*, but still at a very great additional expense—and to run over the rest of their line two separate trains, one carrying the mails and another the passengers. The covenant does not contemplate anything of that kind, and if there was any doubt about it the last words of the covenant seem very clearly to shew that what is meant by "trains not under their control" is, "trains which cannot stop except by the will of some other person other than the company." And if the train is in such circumstances that it cannot legally stop for ten minutes without the consent of some other person, then that appears to me to be a train not under control of the company for that purpose. As to such a train, what the company agreed was simply that they would induce the train, that is, induce the person who really had the control of the train to consent to have it stopped. That they have attempted to do, and the Postmaster-General has refused to allow it. I cannot help thinking that the construction we have adopted agrees both with the letter and the spirit of the covenant. It never was intended so to be construed as that the company might, by stopping a train, be put to an expense of five times or ten times any profit that the Messrs. *Rigby* could get through the stoppage of the train. The covenant seems carefully worded to shew the intention of the parties; and to construe the covenant as putting the company, or possibly the Postmaster-General, to an expense which may be out of all comparison beyond any profit that Mr. *Phillips* can get by the train stopping, would be contrary to the true intent and meaning of what the parties had in view when they framed their covenant. They meant that the trains should stop so far as the company could, without putting themselves to any extraordinary expense or inconvenience, make them stop.

In my opinion, therefore, according to the literal construction of the covenant, and according to what was the true intent and meaning of the parties, the *Great Western Railway Company* did not break the covenant in fulfilling the orders of the Postmaster-

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General by keeping this mail train at *Swindon* for five minutes instead of ten.

SIR W. M. JAMES, L.J.:—

As this is a purely legal question, I do not think it necessary to add anything to what has been said by the Lord Chancellor and the Lord Justice, except that I entirely concur with them.

The Plaintiff waived his right to bring an action, and the bill was dismissed without costs.

Solicitors for the Plaintiff: Messrs. *Park & W. B. Nelson.*
Solicitors for the Company: Messrs. *Young, Maples, & Co.*

BECKETT *v.* CORPORATION OF LEEDS.

L. JJ.

1871

Dec. 8.

1872

Jan. 26, 31;

Feb. 12.

[1868 B. 350.]

Soil of Highway—Right of adjoining Landowner ad medium filum viæ—Street in a Town—Borough English Tenure—Presumption.

The right of the owner of land abutting on a highway to the soil of the highway *ad medium filum viæ* is founded on a presumption of law which exists only in the absence of evidence of ownership.

Whether such presumption has any application to a street in a town, *quære.*

Held, in a suit between the lords of the manor and the corporation of *Leeds,* that the soil of the *Briggate,* an ancient street in the borough of *Leeds,* belonged to the lords of the manor, there being sufficient evidence to rebut the presumption of ownership in the owners of the adjoining houses.

Decision of the Master of the Rolls reversed.

THIS was an appeal from a decision of the Master of the Rolls.

The bill was filed by Sir *Thomas Beckett* and Mr. *H. C. M. Ingram,* lords of the manor of *Leeds,* against the mayor and burgesses of the borough of *Leeds,* to enforce specific performance of an agreement dated the 20th of December, 1867, whereby the Plaintiffs agreed to sell to the Defendants the soil of part of the ancient street called the *Briggate,* in *Leeds,* in front of two plots of land abutting on the street, together with the right of making cellars under that portion of the street.

The corporation did not dispute the title of the Plaintiffs as lords of the manor, but they alleged that the soil of the street comprised in the agreement was not vested in the lords of the manor, but belonged to the corporation, who were owners of the two plots of land adjacent thereto.

The greater part of the town of *Leeds,* including *Briggate,* is within the manor of *Leeds. Briggate,* which is one of the oldest streets in *Leeds,* is a very wide street, being, on an average, sixty-five feet in width. In former times fairs and markets were held in that street, leaving sufficient roadway in the centre for traffic. Stallage and pickage and other tolls were paid to the lords of the manor in respect of such markets until the sale thereof to the corporation in the year 1654.

By a charter dated the 11th of November, 1208 (the ninth year

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of King *John*), *Maurice Paganel*, then lord of the manor, "granted and confirmed to his burgesses of *Leeds* and their heirs liberty and free burgage, and their tofts, and with each such toft half an acre of arable land, to hold of him and his heirs in fee and by inheritance, freely, peaceably, and honourably to pay to him and his heirs, for each such toft and half acre, sixteen pence at Pentecost and the Feast of St. *Martin*" (1).

By a royal charter of the 13th of July, 1626 (the 2nd of *Charles* I.), confirmed and renewed by a royal charter of the 13th of *Charles* II., the mayor, aldermen, and burgesses of *Leeds* were incorporated, and a grant was made to the corporation of the right of holding a market, and of the tolls, stallage, and other profits thereof (2). In later times a market was held on a strip of land in the centre of *Briggate*, but for many years this market had been discontinued.

On the 22nd of September, 1694, the lords of the manor granted to *H. Gilbert* and *G. Sorocold*, their heirs, executors, administrators, and assigns, license, power, and authority to dig up any of the streets and highways in *Leeds*, to lay pipes, and do all things necessary for carrying on certain waterworks for supplying the town with water, in consideration of a yearly rent of £3.

Subsequently the waterworks became vested in the corporation, who paid the rent of £3 to the lords of the manor till the year 1858, when they purchased the rent for £75.

Evidence was given by the Plaintiffs of a few cases in which the owners of houses abutting upon *Briggate* had paid a small fine or rent to the lord in respect of encroachments. It was, however, alleged by the Defendants that, in numerous other cases, owners of houses had made cellars and other encroachments on the soil of the street without interference from the lords of the manor.

Under these circumstances the Master of the Rolls came to the conclusion that the soil of the street belonged to the owners of the tenements abutting on the street, and that the Plaintiffs had not proved their title; and the Plaintiffs appealed from this decision.

Evidence was adduced before the Lords Justices to shew that all, or the great majority, of the tenements abutting on *Briggate*, including the plots of land in question, were of borough English tenure.

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(1) *Wardell's* Municipal History of *Leeds*, App. iv.

(2) Ibid. App. xxi. lxii.

The *Solicitor-General* (Sir *G. Jessel*), Sir *R. Baggallay*, Q.C., and Mr. *North*, for the Appellants:—

The presumption of law that a grant of land abutting on a road passes the soil *ad medium filum viæ* has never been held to apply to grants of houses in a town, and it is especially inapplicable to grants of burgage tenements. It is a presumption which in any case may be rebutted by evidence to shew that the grantor had no intention to grant such a right. In the present case there is such evidence, for the course of dealing with the streets shews that all parties considered that the right to the soil was vested in the lords, not in the owners of the adjoining houses: *Attorney-General* v. *Chambers* (1); *Lord* v. *Commissioners of Sydney* (2); *White* v. *Hill* (3); *Squire* v. *Campbell* (4).

Sir *Roundell Palmer*, Q.C., Mr. *Bagshawe*, and Mr. *Graham Hastings*, for the Corporation of *Leeds*:—

There is no trace in the authorities of the distinction suggested by the other side between a grant of an ordinary piece of land and a tenement in a town. The presumption of law that the road passes *ad medium filum* can only be rebutted by distinct evidence, and the evidence here is unsatisfactory. Even where the parcels have been described by boundaries, it has been held that the soil of the road passed: *Berridge* v. *Ward* (5); and the presumption is applicable to all tenures: *Doe* v. *Pearsey* (6); *Marquis of Salisbury* v. *Great Northern Railway Company* (7).

There is no evidence that there was a street where these houses now stand before the original grant of the tenements; but if there was a street the houses could not have been contiguous, for each tenement had half an acre of arable land. The presumption is that the street was made by the owners of the tenements. With respect to the evidence in modern times of the existence of rights

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(1) 4 De G. & J. 55. 5 Jur NS 745
(2) 12 Moo. P. C. 473.
(3) 6 Q. B. 487.
(4) 1 My. & Cr. 459.
(5) 10 C. B. (N.S.) 400. 7 Jur NS 876
(6) 7 B. & C. 305.
(7) 5 C. B. (N.S.) 174. 5 Jur NS 70

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in the lords of the manor, we contend that it is ambiguous and inconclusive.

Sir *R. Baggallay*, in reply, as to costs.

SIR W. M. JAMES, L.J.:—

In this case I am of opinion that the lords have made out a very clear and satisfactory title to the piece of ground in question. A good deal of the argument has turned upon what is supposed to be the rule of law as to the presumption that closes extend *ad medium filum viæ,* and it is said that this presumption is to be applied to such a house as this in *Leeds,* with respect to the wide space between this house and the houses on the opposite side of the road. The rule, as laid down in *Lord* v. *Commissioners of Sydney* (1), in which case the matter was probably more fully considered than in any other, is, that in all these cases you must have regard to the circumstances in which the words were used. The learned Judge who there gave the judgment of the Court, Sir *John Coleridge,* says this: "If lands were described as bounded by a house, no one could suppose that the house was included in the grant: but if lands granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium filum,* in the far greater majority of cases wholly unprofitable." I should myself, if it were necessary to determine it, be very slow to come to the conclusion that where there is a road going through an estate, and a site is granted by the road-side for the erection of a cottage or house, and a cottage or house is built upon that site, the mere conveyance, or grant, or demise of a piece of land as the site of and for the purpose of building a house is, in presumption of law, a grant to the middle of the highroad, the frontage of which is probably the origin of the house being built on that space. It appears to me that a great many inconveniences might arise from the notion that a mere grant or demise of such a site would of itself raise a presumption of law which deprives the owner of the estate of his possessory title or of his freehold in respect of the half of the highway.

(1) 12 Moo. P. C. 473.

But the present case stands in this way: These were really not houses, according to the evidence before us, originally built by the side of the mere highway, to which the rule could be at all applied. It appears now quite clear that there is a very wide open space, about sixty feet wide, between the houses—a space which was kept and used for fairs and markets, which fairs and markets were the fairs and markets of the lord, and continued to be the fairs and markets of the lord for several centuries after the time at which the space came into existence. It appears to me that in such a case to presume that where the lord of the borough had allowed his dependent burgesses to have what is called a toft fronting towards the market-place and fair-place, which was also used as a road, and then by a grant enlarged the tenure of that toft into a fee simple tenure in borough English, the lord intended to grant, or that the tenant intended to take, the half of the vacant space between the one row of tofts and the other row of tofts, would be to make a presumption inconsistent with common sense and inconsistent with the meaning which the common usage of mankind would apply to such a grant.

But besides this—there being nothing but the presumption, or supposed presumption, in favour of the owner of the house—there is beyond all question the fact that the lord has received, for a great number of years, a substantial money profit for the use of part of the soil of the road in question. It is a sum of three guineas a year, and no doubt that is not a very large sum, but it is a substantial sum, which the lord has received, latterly from the corporation, before that from individuals who were speculatively engaged in establishing works for the benefit of the town, and which must have been received, as it appears to me, with the full knowledge of everybody connected with the town of *Leeds* at the time. Then, in addition to that, the lord has received a sum in respect of the encroachments upon part of this very street, one or two upon the street called *Briggate*, one or two more upon that which, if not strictly part of *Briggate*, is, at all events, a continuation of the same line of road towards the country.

It appears, therefore, to me that the lord has had a practical enjoyment of the profits of the thing itself, as against which there

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is no evidence of enjoyment of any profit or of any right which can be considered as adverse to the title of the lord.

Under these circumstances I am of opinion that a good title has been shewn by the Plaintiffs. I am also of opinion that a good title was shewn before the institution of the suit.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Looking at the nature of the property, namely, a road which passes between houses with respect to which you cannot expect to prove the property in it by the ordinary tests of ownership, I think that the lord has really made out an extremely strong case.

In the first place, I agree that, looking at what we know about the land in question in ancient times, there is no presumption that each toft went to the middle of the highway. I think it is clearly to be presumed that the road between the tofts must have existed from time immemorial, because the fairs and markets must be presumed to have been from time immemorial. As regards the markets it is expressly recited in the charter of *Charles* I. that they had existed from time immemorial, and the fairs must have existed likewise from time immemorial, because there is no trace of any grant. Then in the time of King *John*, there is a small town with a market-place and a fair-place in the middle of it, a small portion only of which was probably occupied as a highway at that time, but with spaces between used for the common benefit of the public; and the franchise of the markets and fairs was in the lord.

Then we find that at some time, certainly before the time of King *John*, there were granted out tofts simply by the rod, at will in the first instance, and then as burgage tenements. Then is it to be presumed that the lord intended to grant the actual soil of all that space which was dedicated to the use of the public, and which was to be used for the purpose of markets and fairs? It appears to me it is extremely improbable that it could have been intended at that time to do so, and that, whatever may have been the presumption at that time, the acts of ownership since have been very strong indeed. The lord having granted the right to lay down water pipes in all the streets in *Leeds*, and having re-

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ceived an annual payment for years in respect of such pipes, is very strong evidence. So also is the granting the liberty to make encroachments in the streets, and receiving payments, some fixed and some annual, for such encroachments.

Then what is there on the other side? Nothing but the most slight evidence of small encroachments in very modern times, and we have to decide this, in fact, as jurymen, and say whether, on this evidence, we ought to find in favour of the lords of the manor. When we are considering what happened in ancient times, we cannot always make out what was the actual truth, but we must make up our minds how to act upon such evidence as we can get; and in this particular case I am convinced that the soil in the ancient streets did belong to the lord, and that up to a very modern period that was the universal opinion in *Leeds*, and that it is only in modern times that doubts have been cast upon it.

Under these circumstances I am of opinion that a jury would properly come to a conclusion in favour of the lords, and that if they did not, a common law Court would send back the case for a new trial.

Solicitors for the Plaintiff: Messrs. *Paterson, Snow, & Burney.*
Solicitors for the Defendants: Messrs. *Wright & Venn.*

HARDY *v.* METROPOLITAN LAND AND FINANCE COMPANY.

[1870 H. 121.]

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Jan. 30;
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Company—Breach of Trust by Directors—Unauthorized Deposit of Money with another Company—Money still in the hands of the borrowing Company—Manager—Agent—Money Demand—Jurisdiction.

The directors of a building society deposited money, in a manner unauthorized by their rules, with a finance company, the manager of which was also manager of the building society. Afterwards the deposit was called in, and the directors of the finance company gave a cheque for the amount to their manager, to be paid by him to the building society. He appropriated it to his own use. A bill was then filed by the trustees of the building society to recover the money from the finance company:—

Held (reversing the decision of the Master of the Rolls), that the manager

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held the money as agent for the finance company until he should pay it to some person competent to give a receipt on behalf of the building society; and that as he never paid it over, the money must be taken to be still in the hands of the finance company, who were liable to repay it to the building society:

Held, also, that as it was trust money a suit to recover it was maintainable, and the finance company were accordingly ordered to repay the money, with interest.

8 Ch 1049
7 Ch D 67

THIS was an appeal from a decree of the Master of the Rolls (1).

The bill was filed by the trustees of the *London Benefit Building Society*, to recover from the Defendant company a sum of £375 alleged to have been improperly deposited with them.

The building society was established pursuant to the provisions of the Act 6 & 7 Will 4, c. 32, with which was incorporated the Act 10 Geo. 4, c. 56; and the rules were duly certified.

By the 13th section of the 10 Geo. 4, c. 56, the treasurer or trustee of every friendly society is authorized and required, from time to time, with the consent of the society, to lay out such part of the moneys paid for the purposes of the society as the exigencies of the society shall not call for the immediate application or expenditure of, either in real or heritable securities, or to invest the same in the public stocks or funds, savings banks, or government securities, or in certain banks in *Scotland* therein mentioned, and not otherwise, in the name of such treasurer or trustee.

The rules of the *London Benefit Building Society* directed that the treasurer, or in his absence one of the trustees, after each meeting, should deposit the money received at that meeting in the bank of the society, in the name and to the credit of the trustees, immediately after he should have received the same (Rule 6). And that Mr. *Joseph Dutton* should be the manager of the society, and the *City Bank*, *Threadneedle Street*, the bank of the society (Rule 7).

The Defendant company was incorporated, among other things, for the raising and borrowing money at interest, and receiving deposits.

Joseph Dutton, the manager of the building society, was also manager of the Defendant company, and he was permitted by the directors of the building society to deposit some of the society's moneys with the Defendant company. These deposits were made from time to time, between 1866 and 1869, and in March, 1869, a balance of £375 was standing to the credit of the building society in the books of the Defendant company. The Defendant company not being a banking company, no cheques were drawn on them, but when a deposit was withdrawn two of the directors of the company drew a cheque on their bankers in favour of the depositor for the amount withdrawn.

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(1) Law Rep. 12 Eq. 386.

On the 23rd of March, 1869, two of the directors of the Defendant company, one of whom was also a director of the building society, drew a cheque for £375 on the *City Bank*, in favour of the *London Building Society*, which was countersigned by *Joseph Dutton*, as manager of the Defendant company, and was then given into his possession. The cheque was kept by him till the 16th of April, 1869, when it was cashed by the *City Bank*. The money was never paid over to the trustees or directors of the building society. *Dutton* shortly afterwards died. The trustees claimed payment of the sum of £375 from his administrator, but the estate being insolvent they were unable to recover the amount.

The Plaintiffs alleged that the deposit of the society's moneys with the Defendant company was unauthorized and illegal, and that the Defendant company had notice of such illegality; that the repayment to *Dutton* was made without any authority from the directors of the building society, and without taking a proper receipt, and they prayed that the Defendant company might be ordered to repay the amount. The Defendant company, by their answer, alleged that they had no notice, through *Dutton* or otherwise, that the building society had no power so to invest their moneys; and that if that were so, it followed that the society had also full notice of the fact of that investment, as some of the directors of the Defendant company were also directors of the building society. They also insisted that they had duly repaid the sum of £375 by the cheque given to *Dutton*, and submitted that the relief sought by the bill was in the nature of a mere money demand, and might be properly dealt with by a Court of Law.

The Master of the Rolls held that the remedy of the building

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society, if any, was at law; and dismissed the bill, with costs, without prejudice to any proceedings at law; and from this decree the Plaintiffs appealed.

Mr. *Southgate*, Q.C., and Mr. *Davey*, for the Appellants:—

The deposit of the money was a breach of trust, and was contrary to the Act of Parliament, so that the Defendant company had constructive notice at the time when they received the money: *Ernest* v. *Nichols* (1). The case of *In re Marseilles Extension Railway Company* (2) differed from this case, inasmuch as there there was nothing in the act of borrowing and lending which was illegal; but here the building society had no power to lend. The Defendant company never professed to be bankers; the deposit was made as an investment, and as such was illegal. The money having come to the hands of the Defendants tainted with a breach of trust, the Plaintiffs are entitled to sue in equity: *Gray* v. *Lewis* (3): *Ernest* v. *Croysdill* (4). And it is no objection to the suit that the directors of the building society who were concerned in the breach of trust are not parties: *M'Gachen* v. *Dew* (5). The money must be considered still in the hands of the Defendant company, for they gave the cheque to *Dutton*, who was their own manager, and he held it as their agent, not as the agent of the building society.

Mr. *Swanston*, Q.C., and Mr. *Cookson*, for the Defendants:—

Dutton was the authorized agent of the building society, and, moreover, they adopted the payment to him by claiming against his estate after his death. It was merely an afterthought to treat the transaction as a breach of trust. The bill does not allege a breach of trust in depositing the money with the Defendant company, but in the payment of it out. If it was a breach of the rules of the building society, we had no notice of it. We only had notice of the Act; but this payment was not an investment, but a deposit of their loose cash at call, which they might lawfully make with a banker; and we received it as such. We had no constructive notice of their rules or resolutions; and if the fact of our having common directors gave us notice of these rules, the building society had equally notice of the investment, and cannot now complain of it. This is a mere money demand, and ought to be dealt with in a Court of Law.

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(1) 6 H. L. C. 401. 3 Jur NS 919
(2) Law Rep. 7 Ch. 161.
(3) Law Rep. 8 Eq. 526.
(4) 2 D. F. & J. 175, 196. 6 Jur N.S
(5) 15 Beav. 84.

SIR W. M. JAMES, L.J.:—

The arguments in this case have satisfied me that the Court has jurisdiction to do, what it is clearly right to do, namely, to order the Defendants to repay the money to the persons entitled to it. Assuming them to have been in debt in the sum of £375 to the *London Benefit Building Society*, which they do not deny, I am of opinion that the mode in which they profess to have discharged themselves is totally inadequate.

The course of dealing, according to the Defendants' own statement, was, that the manager informed the directors what deposits were to be withdrawn, and that the directors drew cheques for the amounts, which were countersigned by the manager, and then left with him to be paid to the persons entitled to them. On this occasion the manager represented to the directors that the *London Building Society* had required the repayment of the sum of £375, and on that representation they drew a cheque for that amount, which was countersigned by him, and then left in his hands, together with other cheques drawn in the same manner, to be paid to the proper persons. Till the payment was completed by passing the cheque to the *London Building Society*, or to some person competent to give a receipt for it on their behalf, it remained in *Dutton's* hands, as the company's manager, and the company had not discharged themselves from it.

Therefore, the only question is, whether this was so clearly a mere money demand that the Court has no jurisdiction to deal with it, but must turn the Plaintiffs away from its doors to seek their remedy elsewhere. At first it appeared to me that there was some difficulty on this point. But now it appears beyond all doubt that this money was money belonging to the *London Building Society*, and that it was not in accordance with the Act of Parliament or their rules that it should be lent to or deposited with the *Metropolitan Land Company*. It was therefore trust money, placed by an improper act of the directors of the *London Building Society* in the hands of the Defendants, and as they have never discharged themselves from it, it is trust money still in their hands. It is, therefore, in my opinion, open to the Plaintiffs, finding this trust money in the hands of the Defendants, to call upon them to pay it back. If the money had been paid away by the Defendants, it would have required further investigation whether the Defendants had sufficient notice of the breach of trust to enable the Plaintiffs to recover it by these proceedings. But as the facts now stand, I am of opinion that the Court has jurisdiction to order the money to be paid to the Plaintiffs, and that their bill ought not to be dismissed on the technical ground that their remedy is in a Court of Law. The decree of the Master of the Rolls must be reversed, and a decree made for the payment of the money to the Plaintiffs, with interest at £4 per cent.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The Master of the Rolls decided the case on the ground that this was a mere money demand; but looking at the Act of Parliament and the rules of the society, it appears to me clear that the directors were guilty of a breach of trust in depositing this money with the Defendants. If the money was to be permanently invested the directors were bound by the Act to invest it in certain securities only; and if it was money kept for immediate use, it was contrary to their rules to deposit it in any bank except the *City Bank*. It was therefore a breach of trust on the part of the directors to deposit it with the Defendants. That being the case, the question is, can this suit be maintained? If the money is still in the hands of the Defendants it is clear that the question of notice is immaterial. The payment to *Dutton* cannot be treated as a payment to the *London Building Society*. The course of business shews this. The cheques were given to *Dutton*, as the agent for the *Metropolitan Land Company*, and till he had paid them over he held them as their agent. In this case he never paid the cheque over to the building society. The only ground alleged for treating *Dutton* as the agent of the building society was that the Plaintiffs had served a demand for payment on *Dutton's* personal representative. But

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the mere fact of making a mistaken demand which produced no result is not enough to alter the Plaintiffs' rights; it could not be conclusive evidence that *Dutton* had received the money as the agent of the Plaintiffs.

The result is, that this money came into the hands of the Defendants by means of a breach of trust, and that it is still in their hands, and therefore they must now refund it.

Solicitors for the Plaintiffs: Messrs. *Willoughby & Cox.*
Solicitors for the Defendants: Messrs. *Sharp & Turner.*

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[1871 C. 203.]

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Feb. 19, 26.

18 Ch D 113

Apportionment—Change of Interest without Death—Absolute Estate reduced to a Life Estate—4 & 5 *Will.* 4, *c.* 22; 33 & 34 *Vict. c.* 35—*Executory Settlement—Estate without impeachment of Waste—Married Woman—Restraint on Anticipation.*

A testator gave his residuary personal estate, with the accumulations thereof, to his trustees in trust for his two granddaughters *C.* and *P.*, as tenants in common, their shares to be vested at twenty-one or marriage, the income to be applied for their benefit during minority, and the surplus accumulated. And the testator directed that in case either granddaughter married under twenty-one the trustees should settle her share for her life for her separate use, with remainder to her children. Both the granddaughters married under twenty-one, *C.* in 1867, and *P.* in 1870, which was after the passing of the *Apportionment Act* (33 & 34 Vict. c. 35):—

Held, that in both cases the income of the granddaughter's share was apportionable up to the time of her marriage.

The testator devised his residuary real estate to his trustees in trust for his granddaughter *P.* in fee at twenty-one or marriage, and directed that if she should marry under twenty-one his trustees should settle the real estate on her for life for her separate use, without power of anticipation, with remainder to her children as tenants in common in tail; and he authorized his trustees to give a life estate to his granddaughter's husband, to commence after her decease, and to be either with or without impeachment of waste:—

Held, that the life estate given to the granddaughter must not be without impeachment of waste; such an estate being inconsistent with the restraint on anticipation.

THIS was a special case which was heard before the Lords Justices in the first instance.

Daniel Webb, by his will, dated the 23rd of February, 1859, bequeathed the residue of his personal estate to his executors and trustees, *H. M. Farquhar* and *W. G. Duncan*, upon trust to convert the same and to invest the proceeds thereof, and to stand possessed of the trust funds and securities, and the accumulations thereof, in trust for his grandchildren, *Isabel Webb*, afterwards Mrs. *Clive*, and *Laura Sarah Webb*, afterwards Lady *Peyton*, in equal shares; and he directed that these shares should be vested in them respectively on their attaining the age of twenty-one years, or upon their marriage, which should first happen, with benefit of survivorship in case of either dying under that age unmarried; and the testator directed that, in case either of his grandchildren should marry under the age of twenty-one years, the trustees should, by all proper and necessary deeds, settle her share in the residuary personal estate upon her for life for her separate use, either with or without the power of disposing of the income by anticipation, and after her death for the benefit of her children, as therein mentioned; and he directed that, until the principal of the shares of his residuary personal estate should become payable or divisible, the interest thereof might from time to time be applied for the benefit of the person or persons presumptively entitled to the principal during her or their minority or respective minorities; and if not so applied, the same should be accumulated for the benefit of such person or persons respectively.

The testator devised the residue of his real estates to the trustees upon trust for his said granddaughter, *Laura Sarah Webb*, when and as soon as she should attain the age of twenty-one years, or should marry under that age, which should first happen; and directed that in case she should marry under the age of twenty-one years, the trustees should, by all proper and necessary deeds, settle his said real estates upon the said *Laura Sarah Webb* during her life for her separate use, with a restraint upon anticipation, with remainder to her children as tenants in common in tail, with divers remainders over; and the testator authorized his trustees to secure in such settlement a life interest to any husband of his said granddaughter, either with or without impeachment of waste; and gave power to the trustees to apply all or any part of the income of the real estates for the maintenance and education of his said granddaughter, and directed that subject thereto the income should be accumulated in like manner as the testator directed respecting the income of his residuary personal estate.

The testator died in December, 1860.

On the 9th of January, 1867, *Isabel Webb*, being still an infant, married her present husband, *E. H. Clive*. On the 10th of January an indenture of settlement was executed whereby *H. M. Farquhar* and *W. G. Duncan* assigned one moiety of a sum of £3 per Cent. Reduced Annuities and certain stocks and funds therein mentioned, and all other trust moneys and securities subject to the trusts of the will of *Daniel Webb*, and of the income thereof, and all accumulations of the same, to three trustees in trust for Mrs. *Clive* during her life for her separate use, without power of anticipation, and after her death for her husband during his life, and after the death of the survivor for the issue of the marriage.

On the 24th of November, 1870, *Laura Sarah Webb*, being still an infant, married her present husband, Sir *A. W. Peyton*. On the 25th of November an indenture of settlement was executed whereby *H. M. Farquhar* and *W. G. Duncan* assigned the other moiety of the said trust funds and securities, and all other the share and interest of Lady *Peyton* under the said will of *Daniel Webb*, and the income thereof, and all accumulations of the same, to three trustees in trust for Lady *Peyton* during her life, and after her death for her husband during his life, and after the death of the survivor for the issue of the marriage.

By another indenture of settlement of the same date, *H. M. Farquhar* and *W. G. Duncan* conveyed the residuary real estate devised by the said will to three trustees to the use of the said trustees and their heirs during the life of Lady *Peyton*, without impeachment of waste, upon trust to pay the income to Lady *Peyton* for her separate use, without power of anticipation, with remainder to the use of Sir *A. W. Peyton* during his life, without impeachment of waste, with remainder to the children of Lady *Peyton* as tenants in common in tail, with remainders over; and by the same indenture certain funds representing the accumulations of income of the real estate were assigned to trustees upon the trusts therein mentioned.

The special case, in which Mrs. *Clive* and Lady *Peyton* were Plaintiffs, and Mr. *Clive*, his infant daughter, Sir *A. W. Peyton*, and the trustees of the settlements were Defendants, was filed for the purpose of determining several questions which arose under the settlements; the only questions requiring a report were—

1. Whether the first payment of the income of Mrs. *Clive's* share of the trust funds after her marriage ought to be considered income, or whether it ought to be apportioned between capital and income.

2. The like question respecting the income of Lady *Peyton's* share.

3. Whether the estate limited in favour of Lady *Peyton* during her life ought to be without impeachment of waste.

Mr. *Fry*, Q.C., and Mr. *Kingdon*, for the Plaintiffs:—

With respect to the first question, Mrs. *Clive's* settlement was executed before the *Apportionment Act* (33 & 34 Vict. c. 35), and the question must be determined as the law stood under the 4 & 5 Will. 4, c. 22.

We contend that the Act did not apply to such a case as this. It only directs that an apportionment shall take place "on the death or determination by any other means whatsoever of the interest" of the person interested in the income. But in this case there was no determination of interest. The property vested in Mrs. *Clive* on her marriage; but an alteration has taken place in the mode of enjoyment. The whole of the first payment of income after her marriage must be taken as income under the settlement: *Campbell* v. *Campbell* (1). The cases which will be relied on by the other side are all based upon *St. Aubyn* v. *St. Aubyn* (2). In that case there was a term for accumulation of rents for payment of debts, and it was held that the cesser of that term was a determination of interest. Vice-Chancellor *Malins*, in *Wheeler* v. *Tootel* (3), and Vice-Chancellor *Bacon*, in *Donaldson* v. *Donaldson* (4), although they felt themselves bound by the authority of that case, yet followed it with reluctance. In *Shipperdson* v. *Tower* (5) no previous interest had been given to the

(1) 7 Beav. 482.

(2) 1 Dr. & Sm. 611.

(3) Law Rep. 3 Eq. 571.

(4) Ibid. 10 Eq. 635.

(5) 8 Jur. 485.

person who became entitled after the determination of the trust to accumulate.

The *Apportionment Act* (33 & 34 Vict. c. 35) came into operation before the execution of Lady *Peyton's* settlement; but we contend that that Act was not intended to apply to a case where there was no determination of interest, but only a change in the mode of enjoyment.

With respect to the life interest of Lady *Peyton* in the real estate, it is rightly given to the trustees without impeachment of waste. That is the usual form in settlements; and if her husband has such an estate, it is but reasonable that she have it also: *Bankes* v. *Le Despencer* (1).

Mr. *Langworthy*, for the Defendants, was only called on upon the question as to the life interest of Lady *Peyton* :—

The object of the limitation to the separate use of a married woman is to protect her against her husband's debts. If she has power to cut the timber, her husband would get the benefit of it. In the present case the testator has given discretion to the trustees to give the husband such an estate, but he has given no such discretion in the case of the wife. *Davenport* v. *Davenport* (2) is a direct decision in our favour.

Mr. *W. W. Streeten*, for the trustees.

Mr. *Kingdon*, in reply.

Sir W. M. James, L.J. :—

We think that it is too late to raise the question as to apportionment after the cases which have been decided in this Court. One of them—*Shipperdson* v. *Tower* (3)—was decided as long ago as 1844, and no attempt has been made to shake or question it. We must, therefore, take it to be the *cursus curiæ*, and also the settled understanding of conveyancers, that the *Apportionment Act* did apply to cases of this kind. The new Act of the 33 & 34 Vict. c. 35, extended the principle of the Act of 4 & 5 Will. 4, c. 22, in

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(1) 10 Sim. 576.
(2) 1 H. & M. 775.
(3) 8 Jur. 485.

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the same direction, so as to make it applicable to every form of reservation of income, which was in all cases to be treated as if it were interest accruing *de die in diem*, so that there might be no more questions on this subject.

Therefore the authorities dispose of the question as regards Mrs. *Clive's* settlement, and the recent Act disposes of the question as regards Lady *Peyton's* settlement. There must be an apportionment of the income in each case up to the date of the lady's marriage.

There remains the question respecting the form of the limitation of the life estate to the trustees for Lady *Peyton*. The testator has directed the trustees to settle the property on his granddaughter for her separate use, without power of anticipation, and has expressly authorized them to give power to her husband to commit waste, but has authorized nothing of the kind with respect to the granddaughter herself. It appears to me difficult to conceive how a power to commit waste can exist consistently with a restraint on anticipation. The very object of the restraint is to protect the property against the husband; but if the power to commit waste was given, all the timber on the estate might be swept away to pay the husband's debts. There was no inconsistency in giving such a power to the husband. The trustees might fairly have a discretion in the matter, in order that they might make the best terms they could with the husband, and this discretion they have exercised.

SIR G. MELLISH, L.J., concurred.

Solicitors for all parties: Messrs. *Cope, Rose, & Pearson.*

ALLAN *v.* GOTT.

[1867 A. 67.]

L. JJ.
1872
Feb. 28;
March 1.

Will—Exoneration of Personalty—Legacies charged on Real Estate—Discretion in Trustees to sell—Mixed Fund of Realty and Personalty.

In order that legacies charged upon real estate may be payable out of the real and personal estate *pro ratâ*, it is not necessary that the testator should have directed an absolute conversion of the real estate. It is sufficient that he has shewn an intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid.

Therefore, where a testator had empowered his trustees to sell his real and personal estate in case and as often as they should think fit, and had directed them to pay certain legacies out of the residue of his real and personal estate, and the moneys arising from the sale thereof:—

Held (affirming the decision of *Bacon*, V.C.), upon the construction of the whole will, that the legacies were payable *pro ratâ* out of the real and personal estate.

Tench v. *Cheese* (1) commented on.

3 App Cas 412
11 Ch D 66
16 Ch D 32
26 Ch D 68
8 App Cas 814

THIS was an appeal from an order on further consideration, made by Vice-Chancellor *Bacon*.

John Gott, by his will, dated the 26th of June, 1852, directed his just debts and funeral and testamentary expenses to be, in the first place, paid and discharged out of his personal estate. He then gave various specific and pecuniary legacies, the legacy duty on which he willed should be paid out of his personal estate, and devised two freehold estates (one of which he directed to be chargeable in aid as thereinafter mentioned, with the annuity thereinafter bequeathed to his wife) to his brother *William Gott*. He then gave, devised, and bequeathed all other his real estate, whatsoever and wheresoever, not thereinbefore disposed of, and all his moneys and securities for money, and all other his personal estate and effects not thereinbefore disposed of, to *W. Gott*, *W. Allan*, and *W. W. Maitland*, their heirs, executors, administrators, and assigns, upon the trusts thereinafter declared; and he empowered his said trustees or trustee for the time being, from time to time, in case and as often as they or he should think fit, to sell and absolutely dispose of, call in and convert into money, all and every his said real and

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(1) 6 D. M. & G. 453. / Jur NS 689

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personal estate, and as regarded his real estate, either together or in lots in manner therein mentioned: Provided always that his said trustees and executors should not require from his surviving partner payment of his share in the capital of the business earlier after his decease than by seven annual instalments, the first of such instalments to be paid at the end of twelve calendar months after his decease. And the testator directed that his trustees or trustee for the time being, their or his heirs, executors, administrators, or assigns, should stand possessed of the residue of his said real and personal estate, and of the moneys arising from the sale thereof, or of any part thereof, if and when sold, upon trust, after payment of his debts, funeral and testamentary expenses, and the several pecuniary legacies thereinbefore bequeathed, to invest and place out the residue of the same trust moneys upon the securities therein mentioned, and upon further trust out of the interest, dividends, and annual proceeds thereof to pay an annuity of £1200 to his wife during her life by equal half-yearly payments; and in case the interest, dividends, and annual proceeds of the said trust moneys should at any time prove insufficient for the due and punctual payment of the said annuity, he directed that the same annuity, or so much as should from time to time be unpaid, should be charged upon the estate thereinbefore devised to his brother *W. Gott.* And after reciting that by his marriage settlement a sum of £6000 had been settled on his wife for life, and after her death for himself for life, and after the death of the survivor for such persons as they or the survivor should appoint, and in default of such appointment, for his own executors, administrators, or assigns, the testator declared that the annuity of £1200 was given to his wife in satisfaction of all interest in the said sum of £6000, and upon condition that she should execute a release of the said sum of £6000, so that the sum might become effectually vested in his said trustees, whom he directed to apply the same in augmentation and as part of the fund to arise from the residue of his real and personal estate. The testator then directed that his trustees should, by and out of the said trust estates, moneys, and premises, raise the sum of £10,000 for each of his six sisters, to be held upon the trusts therein declared; and as to all the residue and remainder of his said real and personal estate, whatsoever and wheresoever, not thereinbefore disposed of, he gave devised and bequeathed the same to his brother *W. Gott*, his heirs, executors, administrators, and assigns, for his and their absolute use and benefit.

The testator died in April, 1867. *William Gott*, the residuary devisee and legatee, died in his lifetime. The present suit having been instituted by *W. Allan*, the surviving trustee, and his wife, who was a sister and one of the next of kin of the testator, for the administration of the estate, the question arose whether the annuity of £1200 given to the testator's wife, and the six legacies of £10,000 each given to the testator's sisters, should be paid out of the personal estate, or whether they were charged upon the real and personal estate *pro ratâ*.

The Vice-Chancellor was of opinion that the testator had shewn an intention of making a mixed fund of his residuary real and personal estate, and that the legacies in question must be borne by the real and personal estate rateably.

From this decision the heir-at-law of the testator appealed.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *Whitehorne*, for the Appellant:—

In order that the legacies may be payable rateably out of the real and personal estate, it is necessary to shew an intention not only to charge the realty but to discharge the personalty. It is not sufficient that there should be a trust for sale of the realty; there must be an absolute direction to sell, and a manifest intention to create a mixed fund. Here there is a discretion given to the trustees whether to sell or not, and no manifestation of an intention to create a mixed fund: *Roberts* v. *Walker* (1); *Young* v. *Hassard* (2); *Boughton* v. *Boughton* (3); *Tench* v. *Cheese* (4); *Simmons* v. *Rose* (5); *Bedford* v. *Bedford* (6); *Rhodes* v. *Rudge* (7); *Collis* v *Robins* (8); *Greenway* v. *Greenway* (9). The authority of *Falkner* v. *Grace* (10), which may be relied on by the other side, is weakened by the observations in *Tench* v. *Cheese*.

(1) 1 Russ. & My. 752.
(2) 1 J. & Lat. 466.
(3) 1 H. L. C. 406.
(4) 6 D. M. & G. 453.
(5) Ibid. 411.
(6) 35 Beav. 584.
(7) 1 Sim. 79.
(8) 1 De G. & Sm. 131.
(9) 2 D. F. & J. 128.
(10) 9 Hare, 280.

Jm W5689

Mr. *Amphlett*, Q.C., Mr. *Swanston*, Q.C., Mr. *Kay*, Q.C., Mr. *Eddis*, Q.C., Mr. *Fry*, Q.C., Mr. *Lindley*, Q.C., Mr. *Bagshawe*, Mr. *Brodrick*, Mr. *Marten*, Mr. *North*, and Mr. *Davey*, for the various Respondents, were not called on.

Sir W. M. James, L.J.:—

We do not think it necessary to hear the counsel in support of the decree of the Vice-Chancellor in this case, because we are satisfied that the decree is perfectly right.

As a great number of cases have been cited, it perhaps may be convenient, and of some utility, to recur a little to the principles of which those cases are illustrations and applications. Now, it is quite clear that by the law of the land the debts of a deceased person are a charge upon his personal assets wholly irrespective and paramount to any will which he may express with regard to them. The executor is bound to pay the creditor, and the creditor is entitled to be paid out of those personal assets immediately, or as soon as it can be done in the course of administration. Therefore the personal estate is the primary fund for the payment of debts. To a great extent the same thing is applicable to legacies; that is to say, legacies given *simpliciter* are to be paid by the legal personal representatives out of the personal assets, and therefore the ordinary rule and presumption is, that the personal estate is also the primary fund for the payment of legacies. That being so, it was long ago settled that where a testator was minded, in addition to his personal estate, to make his real estate assets for the payment of debts and legacies, or either of them, the presumption is that the real estate was made an auxiliary fund, secondarily liable only, to the personal estate, which still retained its primary liability. That being so, it was held that it was absolutely necessary, not only to have an expression of oneration of the real estate, but a sufficient expression of exoneration of the personal estate, either wholly or partially, before there could be any interference with the ordinary rule for the application of assets. At first it seems to have been thought that that was to be evidenced by actual expression of oneration and exoneration. but in a series of cases, of which the case of *Bootle* v. *Blundell* (1)

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(1) 1 Mer. 193.

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is a sufficient instance, it was held that you might in that case, as in any other case, for this purpose as well as for other purposes, look at the whole contents of the will; and if, upon an interpretation of the will according to the ordinary principles of legal construction, the Court arrived at a judicial conviction that there was an intention on the part of the testator, not merely that the real estate should be onerated, but that it should be onerated in partial or total exoneration of the personal estate, the Court was bound to give effect to that intention. But, with regard to legacies, it is important to observe that legacies do not stand entirely on the same footing as debts. A gift of a legacy or a sum of money may well be made so as not to charge personal estate at all. It is of every day occurrence that a man may give his farm of *Whiteacre* charged with an annuity or sum of money in favour of a second person. In that case the annuity or sum of money would never be a legacy in respect of which the personal estate was ever charged at all; and you would not be obliged to find any intention to exonerate that which was never onerated. A testator may also do this—he may give to a specific devisee, or to a specific legatee, a portion both of his real and personal estate; for instance, he may give his freehold house, together with his leasehold coachhouse and stable, together with the furniture and effects in the house, coachhouse, and stable, all to one person, charged with the payment of an annuity or a sum of money to some other person. In that case there would be no question of priority as between the freehold and personal parts of that which constituted one subject of gift to one person; but so far as it might be necessary to ascertain the effect of the charge upon a subsequent devolution of title, the whole charge in that case would be a charge equally upon all and every part of the subject of the gift.

In that state of things came the case of *Roberts* v. *Walker* (1), in which this occurred: A testator gave the whole of his real and personal estate, with directions to convert them and pay legacies out of that fund, and thereupon the question arose what was the proper mode of application in that case. Sir *John Leach*, the Master of the Rolls, said that, in a case of that kind, "When a testator creates from real estate and personal estate a mixed and general

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(1) 1 Russ. & My. 752, 767.

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fund, and directs the whole of that fund to be applied for certain stated purposes, he does in effect direct that the real and personal estates which have been converted into that fund shall answer the stated purposes, and every of them, *pro ratâ*, according to their respective values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those purposes is undisposed of." That decision came to be considered in a case of *Boughton* v. *Boughton* (1), in which there was a mere gift of real and personal estate, with a direction to pay certain annuities out of the rents and profits. Vice-Chancellor *Knight Bruce*, upon that case coming before him, considered it absolutely clear, according to his view of the testator's intention, that a mere gift to trustees in trust to pay out of the aggregate property the sums in question, was of itself a sufficient indication of intention to create a mixed and general fund within the meaning of the case of *Roberts* v. *Walker* (2). An appeal was, however, brought to the House of Lords, and in the House of Lords Lord *Cottenham*, in moving the house for a reversal of the Vice-Chancellor's decree, was of opinion that there was no such intention to be gathered from the will in that case, and took some pains to shew that, in truth, not only was there no intention to create a mixed and general fund, but that it was not in the testator's contemplation that the real estate should be sold at all. That seems to have been the main ground upon which he based his speech to the House of Lords.

However, that question had again to be considered in *Tench* v. *Cheese* (3). There a testator gave his real and personal estate to trustees, in trust to pay an annuity to *M. P. S.*, and if she should have children, to raise £4000 for the younger children. Upon consideration of the case of *Boughton* v. *Boughton*, the Court, consisting of Lord Chancellor *Cranworth*, Lord Justice *Turner*, and Lord Justice *Knight Bruce*, who evidently retained his own original opinion in *Boughton* v. *Boughton*, held that the rule in *Roberts* v. *Walker* did not apply. They said it possibly might be more consistent with common sense to think that it could not make much difference whether a man directed his debts and legacies to be paid out of real estate, which he gave to his trustees charged with those debts and legacies, leaving it to be implied that they were to raise them as they could, or whether he gave it on an express trust—possibly the distinction between the two would be so nice a distinction that it would hardly commend itself to the uninstructed mind—but the Lord Chancellor and Lord Justice *Turner* were of opinion that where there is that simple gift of the whole real and personal estate, and no direction to sell, the application of the estate would be according to the ordinary rule, namely, that the personal estate must be applied first, and the real estate in the next instance. One or two expressions of the Lord Chancellor and Lord Justice *Turner* were relied upon in support of the contention of the Appellant in this case. One was an expression used by the Lord Chancellor, who said there was "a direction to sell;" and Lord Justice *Turner* used these words: "The mere fact of the real and personal estate being given together does not constitute them a mixed fund for the payment of debts, legacies, or annuities; but in order to effect that purpose, there must be a direction for the sale of the real estate so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will." From that it was contended that the case establishes as a rule of law that there must be an absolute conversion out and out. Now that was not really necessary for the decision of that case, and the distinction between an absolute direction and a discretionary power to sell was not before their Lordships; and I do not understand that case as laying it down that the only case in which this doctrine of total exoneration is to be found is where there has been a direction to convert the real estate. Otherwise, the rule would exclude a case in which a testator says expressly that he means his real estate to be the primary fund. There must be other modes of ascertaining whether that is the intention. The decision was simply that where there is a mere gift of real and personal estate together, that mere fact does not constitute them a mixed fund for the payment of the legacies or annuities.

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(1) 1 H. L. C. 406. (2) 1 Russ. & My. 752. (3) 6 D. M. & G. 453. 1 Jur 45

It appears to me that that case does not compel us to say there must be an absolute conversion in order to bring the case within the meaning of the rule in *Roberts* v. *Walker* (1).

There are two other cases which I ought to notice. One was

(1) 1 Russ. & My. 752.

Falkner v. *Grace* (1), decided by Lord Justice *Turner* when Vice-Chancellor. I think that decision was quite right, because the gift was of a moiety of the estate, which, in my opinion, would be exactly the same thing as a gift out of a share. It stands in the same way as a gift out of a specific portion, and therefore that case is unaffected by *Tench* v. *Cheese* (2). Then, with regard to the decision of the Master of the Rolls in *Bedford* v. *Bedford* (3), that was a case where the property was given for the purpose of answering the immediate object with an ultimate direction to sell. That is a sufficient indication of an intention to make it a mixed fund, and that decision is not inconsistent with *Tench* v. *Cheese.*

Now, when we consider the whole of this will before us, it appears to me that it is really stronger in many respects than the will in the case of *Roberts* v. *Walker* (4). I think that there is strong evidence of intention that there should be a mixed fund made out of the two estates. It is not unimportant to observe that the testator begins by directing the payment of his debts out of his personal estate. He then gives certain specific legacies, and also certain large pecuniary legacies, which are payable, in the ordinary course of administration, out of the personal estate. Having so directed the application of his assets, and having made these specific devises and bequests, and these pecuniary bequests, he is then minded to take the residue which shall remain, not only of the personal estate, but of the real estate, and he gives them altogether in one mass to his trustees upon the trusts afterwards expressed, not with any positive direction to sell the real estate, but with directions which appear to me to shew more completely a union and fusion of the two estates than I have found in any of the cases cited to us. For he empowers the trustees to deal with the whole of the aggregate mass of real and personal estate in their discretion; he gives them power to sell any part of the real, or any part of the personal, estate as and when they shall think fit, which in itself would be inconsistent with the idea that they were bound, under penalty of breach of trust, to apply the whole of the personalty in payment of the charges afterwards thrown on the fund before they could resort to the real estate. In fact, he has put the whole property into their hands as one mixed estate, with a full discretion in them to sell and apply if and as they think fit the whole of the realty before they touch a single portion of the personalty; and he goes on to direct, with regard to a considerable portion of his personalty, that they shall not have the means of using that for the purpose of discharging the sums he has subsequently given; because, with regard to his share of the capital in his partnership business, he directs that they shall not call it in except by seven annual instalments, and the first of those seven annual instalments is not to be required until twelve months after his death, by which time it would be presumed that the legacies would be paid. Then, by way of evidencing the mixed and special character of the fund he has so created, he has directed to be added to that, something which is no part of either his real or personal estate. His wife had an interest in certain property under her marriage settlement, and he directs her to release it, not to his real estate, or to his personal estate, but to release it for the purpose of its being added to that which he himself calls the fund which was to be produced from his real and personal estate. He directs investments of that fund in Government and real securities; he gives an annuity to his wife payable out of the mixed fund, and then six legacies of £10,000 each, to be raised out of the special fund so specially constituted. I am of opinion that he has well and effectually constituted a mixed fund of the real and personal estate, and of the third estate brought into it, which he has made specifically subject to those charges. I think the result is that these sums, which he has directed to be raised out of the mixed property so given, are a charge upon the whole and every part of it, and that the Vice-Chancellor was right in saying that the real estate must bear its share of the burthen, although by far the largest portion will fall on the personal estate. The appeal must therefore be dismissed. The costs will come out of the estate.

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(1) 9 Hare, 280.
(2) 6 D. M. & G. 453. 1 Jur NS 689
(3) 35 Beav. 584.
(4) 1 Russ. & My. 752.

Sir G. Mellish, L.J. :—

I am of the same opinion.

Solicitors: Messrs. *Bell, Brodrick, & Grey*; Mr. *H. A. Maude*; Messrs. *Paterson, Snow, & Burney*; Messrs. *R. & W. B. Smith*; Messrs. *Palmer, Eland, & Nettleship*.

L. JJ.
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Feb. 26 :
March 2, 4, 7.

WILSON *v.* O'LEARY.

[1870 W. 143.]

Legacies—Two Codicils—Cumulative Gift—Evidence—Letter from Solicitor to Testator.

LR 17 Eq 54
19 Eq 237
3 Ch D. 758

A testator, by codicil, gave legacies of various amounts to nine legatees, and a year's wages to every one of his servants. He afterwards made a second codicil, which was substantially a copy of the former, except as follows:—One of the legatees named in the first codicil was not named in the second—three of the legacies given by the second codicil were less than those given by the first to the same persons—one legacy was given by the second codicil to a person not named in the first—the gift to servants by the second codicil was of " a year's wages liberally interpreted," and the second codicil contained a direction for payment of duty on legacies :—

Held (affirming the decision of *Bacon*, V.C.), that the case was not taken out of the general rule that the gift of a legacy by a subsequent instrument to a person who takes a legacy under an earlier instrument is cumulative and not substitutionary:

Held, also, that a letter written to the testator by his solicitor advising him to recopy his first codicil was inadmissible.

THIS was an appeal by the residuary legatees under the will of General Sir *De Lacy Evans*, from a decision of Vice-Chancellor *Bacon*, holding that legacies given by a second codicil were in addition to and not in substitution for those given to the same persons by an earlier codicil. The case is reported. (1)

The testator by his will, made in 1860, after giving legacies to *John O'Leary*, *Henry O'Leary*, and others, bequeathed the residue to *John O'Leary* and *H. O'Leary* in equal shares.

The first codicil was dated the 17th of June, 1867. The second was not dated, but was shewn to have been made in January 1868.

For convenience of comparison they are given below in parallel columns, and in paragraphs; the clauses by which gifts of different amounts were given to the same persons being printed in italics, and the clauses which had nothing in common in capitals.

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(1) Law Rep. 12 Eq. 525.

"This is a codicil to the will of General Sir De Lacy Evans, G.C.B.

I will and bequeath £4000 *to my dear friend Colonel Townsend Wilson, late of the Coldstream Guards.*

I will and bequeath £2000 *to General Sir Richard Dacres, R.A.;*

£2000 *to Admiral Sir Sydney Dacres;*

£2000 to John O'Leary, of Fort Shannon Glin;

£3000 to Henry O'Leary, of New Zealand;

£500 to Alexander Greig, Esq., of Lowndes Street;

£1500 to Mrs. Mary Ann Sleeman, natural daughter of my late uncle, Major Henry Evans, long since deceased;

£1500 to my excellent servant and friend, Samuel Smart, or Smouth;

and an additional £500 if he should be with me at my death;

A year's wages to every one of my servants;

£2000 TO DEBORAH WARR, MY HOUSEKEEPER, AND THE ATTACHED FRIEND OF MY LATE DEAR WIFE."

"This is a codicil to the will of me, General Sir De Lacy Evans, G.C.B.," which was dated September, 1860.

"*I will and bequeath* £2000 *to my dear friend Colonel Townsend Wilson, late of the Coldstream Guards.*

I will and bequeath £1000 *to General Sir Richard Dacres, R.A.;*

£1000 *to Admiral Sir Sydney Dacres;*

I will and bequeath £500 to Alexander Greig, Esq., of Lowndes Street Square;

£2000 to John O'Leary, Esq., of Fort Shannon;

£3000 to Henry O'Leary, at present of New Zealand;

£1500 to my excellent head-servant, Samuel Smart, or Smouth;

and £500 extra if he shall be with me at my death;

£1500 to Mrs. Sleeman, natural daughter of my late uncle, Major Evans, of Goujam, India.

I bequeath a year's wages, liberally interpreted, to all my servants.

I BEQUEATH £2000 TO MY DEAR AND VALUED FRIEND, CAPTAIN W. EASTWICK, OF THE COUNCIL OF INDIA.

THESE SHALL BE FREE OF LEGACY DUTY."

The will and both codicils were admitted to probate.

On further consideration before Vice-Chancellor *Bacon* the residuary legatees tendered in evidence a letter from the solicitor who prepared the will and first codicil, and an affidavit from the solicitor, who deposed that the testator after having made the will and first codicil, and left them with him, wrote to him for copies of them, which the solicitor sent with the letter in question, in which he advised the testator to recopy the codicil, as his signature to it was in an inconvenient place. The admission of this letter was objected to. Having been read before the Chief Clerk, and entered in his certificate, it was read *de bene esse*, but the Vice-Chancellor considered it immaterial, and decided that the legacies were cumulative.

Mr. *Kay*, Q.C., and Mr. *W. Pearson*, for the Appellants:—

No doubt legacies given by two distinct instruments are, *primâ*

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facie, cumulative: *Hooley* v. *Hatton* (1); but even small circumstances have often taken a case out of the rule: *Russell* v. *Dickson* (2). Where the same cause is mentioned for the two gifts they are not cumulative: *Duke of St. Alban's* v. *Beauclerk* (3); *Benyon* v. *Benyon* (4). Gifts have been held substitutionary where one instrument was, in the main, a mere repetition of the other, as here: *Allen* v. *Callow* (5); *Barclay* v. *Wainwright* (6); *Campbell* v. *Earl Radnor* (7); *Coote* v. *Boyd* (8), which is very similar to the present case; *Robley* v. *Robley* (9); *Gillespie* v. *Alexander* (10); *Hemming* v. *Gurrey* (11); *Moggridge* v. *Thackwell* (12); *Kidd* v. *North* (13); *Attorney-General* v. *Harley* (14). The affidavit is admissible in evidence to shew the circumstances under which the second codicil was made: *Martin* v. *Drinkwater* (15); *Guy* v. *Sharp* (16).

Mr. *Amphlett*, Q.C., and Mr. *Renshaw*, for the Plaintiffs.

Sir *Roundell Palmer*, Q.C., Mr. *Everitt*, and Mr. *Bowen May*, for Admiral *Dacres* and General *Dacres*:—

In deciding this case there are four undisputed principles to be kept in view: 1. That the Court of Probate has exclusive jurisdiction to decide whether one instrument is a total revocation of another. The grant of probate, therefore, is conclusive that there is no such total revocation here. 2. That if both instruments are admitted to probate then *primâ facie* a gift in the second is a new gift, not substitutionary for, or revocatory of, a gift in the first. 3. That this presumption is strengthened when the second codicil contains no words of revocation. 4. That a clear gift is not to be taken away or cut down except by something clear, or as it has been often expressed, by something "equally clear"—not, of course, using those words in the strict sense, but as

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(1) 1 Bro. C. C. 390, n.; Tu. L. C. 3rd Ed. 313.
(2) 4 H. L. C. 293, 304.
(3) 2 Atk. 636, 640.
(4) 17 Ves. 34.
(5) 3 Ves. 289.
(6) Ibid. 462.
(7) 1 Bro. C. C. 271.
(8) 2 Bro. C. C. 521.
(9) 2 Beav. 95.
(10) 2 S. & S. 145.
(11) 2 S. & S. 311; 1 Bli. (N.S.) 479.
(12) 1 Ves. 464.
(13) 2 Ph. 91.
(14) 4 Madd. 263.
(15) 2 Beav. 215.
(16) 1 My. & K. 589.

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denoting expressions so clear as to leave no reasonable doubt: *Doe* v. *Hicks* (1); *Bunbury* v. *Bunbury* (2); *Stokes* v. *Heron* (3). On the authorities the gifts here are cumulative. The authority of *Hooley* v. *Hatton* (4), has been recognised in all the later cases. The observations in *Duke of St. Alban's* v. *Beauclerk* (5), are indeed, to some extent, opposed to it, but that case is peculiar, and some of the remarks attributed to Lord *Hardwicke* are not consistent with the current of authority. In page 639, the reason given for taking the case out of the general rule is the peculiar way in which the codicil was imported into the will; and in *Lee* v. *Pain* (6), it is said that *Duke of St. Alban's* v. *Beauclerk* must be considered as standing alone. In *Campbell* v. *Earl Radnor* (7), as Vice-Chancellor *Wigram* observed in *Lee* v. *Pain* (8), neither the facts nor reasoning fully appear. *Ridges* v. *Morrison* (9), and *Baillie* v. *Butterfield* (10), are in our favour. *Moggridge* v. *Thackwell* (11) is explained in *Lee* v. *Pain* (12). In *Barclay* v. *Wainwright* (13) one legacy was expressed to be in addition, which was a strong ground for holding the others to be in substitution. *Benyon* v. *Benyon* (14) and *Currie* v. *Pye* (15), are in our favour, though they may be used against some of the Respondents; and so is *Hurst* v. *Beach* (16). The cases are reviewed in *Suisse* v. *Lord Lowther* (17). *Robley* v. *Robley* (18) turned on double portions. In *Roch* v. *Callen* (19), where the gifts were of equal amount, they were held cumulative, though the words "my servant," might have been held to express the motive. In *Kidd* v. *North* (20) the last instrument was incomplete, but clearly intended to be substitutionary, it was, therefore, treated as such so far as it went. In *Sawrey* v. *Rumney* (21) a rather strong context was held insufficient to make the gift substi-

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(1) 8 Bing. 475.
(2) 13 Jur. 1091.
(3) 12 Cl. & F. 161, 186.
(4) Tu. L. C. 3rd Ed. 313, 315.
(5) 2 Atk. 636.
(6) 4 Hare, 201, 240.
(7) 1 Bro. C. C. 271.
(8) 4 Hare, 244.
(9) 1 Bro. C. C. 389.
(10) 1 Cox, 392.
(11) 1 Ves. 464.
(12) 4 Hare, 219, 244.
(13) 3 Ves. 462.
(14) 17 Ves. 34.
(15) Ibid. 462.
(16) 5 Madd. 351.
(17) 2 Hare, 424.
(18) 2 Beav. 95.
(19) 6 Hare, 531.
(20) 2 Ph. 91.
(21) 5 De G. & Sm. 698.

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tutionary. In *Russell* v. *Dickson* (1) the testator was *in loco parentis*, and there was a very strong context. The parol evidence is inadmissible: *Hall* v. *Hill* (2).

Mr. *H. S. Milman*, for Mrs. *Sleeman* and *Alexander Greig*:—

My case differs from that of Admiral and General *Dacres* only in the equality of the legacies. Equality, where the same purpose is mentioned in each case, favours substitution; but there is no such effect in mere equality: *Watson* v. *Reed* (3); *Spire* v. *Smith* (4).

Mr. *Eddis*, Q.C., and Mr. *Charles Hall*, for Colonel *Townshend Wilson*, *Deborah Warr*, Captain *Eastwick*, *Samuel Smouth*, and the other servants:—

As regards Colonel *T. Wilson* we have nothing to add to the argument for Admiral and General *Dacres*. As to *Deborah Warr* and Captain *Eastwick* no question arises. As regards the servants, it is contended by the Appellants that there is substitution, because the gifts are equal and a motive assigned; but the case, we contend, is not within the rule as to motive in *Hurst* v. *Beach* (5), which only applies where some particular purpose of limited extent is pointed out as the reason for making the gift. *Roch* v. *Callen* (6) is in our favour.

[They also referred to *Robley* v. *Robley* (7); *Moggridge* v. *Thackwell* (8); *Johnstone* v. *Earl of Harrowby* (9); *Lee* v. *Pain* (10); *Suisse* v. *Lord Lowther* (11); *Mackenzie* v. *Mackenzie* (12); *Cresswell* v. *Cresswell* (13).]

Mr. *Kay*, in reply.

March 7. Sir W. M. James, L.J.:—

I am of opinion in this case that the decree of the Vice-Chancellor must be affirmed. The basis of the elaborate and able

(1) 4 H. L. C. 293. 17 Jur 307,
(2) 1 D. & War. 94.
(3) 5 Sim. 431.
(4) 1 Beav. 419.
(5) 5 Madd. 351, 358.
(6) 6 Hare, 531.
(7) 2 Beav. 95.
(8) 1 Ves. 464.
(9) 1 D. F. & J. 183, 191. 6 Jur
(10) 4 Hare, 201.
(11) 2 Ibid. 424.
(12) 2 Russ. 262.
(13) Law Rep. 6 Eq. 69, 76.

arguments which were addressed to us by Mr. *Kay* and Mr. *Pearson* was, that taking the two codicils out of which the question has arisen and putting them side by side, we, as men of the world accustomed to know how testators make testamentary instruments, and judging of all the probabilities of the case, cannot avoid arriving at the conclusion that the one codicil was a corrected and revised transcript of the other, and that the omission to deal expressly with the legacy to the housekeeper of £2000, which alone has saved the first codicil from entire destruction, was a casual omission, an accidental slip, which has enabled her to claim her legacy, but which is not otherwise sufficient to induce us to avoid the inference which we are called upon to draw. In my judgment the whole of that contention is precluded by positive rule of law. The law has provided that no testator's testamentary intentions can be expressed or gathered from anything except the testamentary instrument duly executed and attested as required by law, and that a testamentary intention once so expressed cannot be deemed or taken by any Court to have been altered unless such change of intention is manifested by the statutory evidence. We are, therefore, as it appears to me, bound to presume that the testator intended to do that which he has done in this case, that he intended to leave the two codicils to co-exist as effective codicils to his will; and being bound to assume that he intended the two codicils so to co-exist, the Appellant is at once confronted with this monstrous improbability, as it seems to me, that the testator is to be assumed to have intended to have left one codicil to exist for the sole purpose of giving the legacy to the housekeeper of £2000, which he could have given by a mere additional line to that which is supposed to have been the corrected transcript of the codicil. That is an intention which appears to me in the highest degree capricious, improbable, and incredible. On the other hand, what is there either capricious, improbable, or incredible, in imputing to the testator the intentions which the Respondents say must be imputed to him. It is to be observed that this testator did not give the residue only to his residuary legatees, but that those same residuary legatees were made by him, both in the will and in the first codicil, pecuniary legatees to a large amount.

The probability is (to guess at probabilities) that he never con-

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templated having a large residue which they were to take under the residuary bequest, but that he was providing for them by a gift of pecuniary legacies what he thought would be substantially the whole benefit that they would derive from his estate. Then having given them pecuniary legacies by his will, he again, by his first codicil, gives to them, amongst others of his friends and relatives, two large pecuniary legacies, one of £4000 and one of £3000, apparently still having the same idea that they would share with the legatees if the estate proved deficient. Then, that being so, he six months afterwards makes another codicil which in effect may be accounted for in this way: He found that his estate was considerably more than he had thought it would be, that he had reason to believe that he had undervalued it. In that state of things there does not seem to be any great improbability in supposing that he intended to add to the legacies to his friends, for instance, to his dear friend Colonel *Wilson*, 50 per cent., to double the legacies to his two nephews, and in the same manner to double the legacies to the other legatees mentioned in the will until he comes to the last, and then, probably thinking that the housekeeper was sufficiently provided for by the £2000, instead of giving her the £2000 which he would give according to the scheme of that codicil, he gave the £2000 to another friend, whom he introduced for the first time in the second codicil. It appears to me, then, that upon the balance of probabilities the balance of probability is not in favour of but against the Appellant. Then, beyond that, I entirely concur in the passage that was read to us, nearly in the same words, from two or three of the judgments which have been delivered in similar cases, that is, that when there is a positive rule of law of construction such as exists in these cases, that is to say, that gifts by two testamentary instruments to the same individual are to be construed cumulatively, the plain rule of law and construction is not to be frittered away by a mere balance of probabilities. I am therefore of opinion that the gifts ought to be construed as cumulative. The gifts to the servants, and the gift of the £500 extra to the testator's old servant and friend, as he calls him in the first codicil, may perhaps stand on rather a different footing from the other legacies. It is contended on one side that they come within the general rule, that gifts of the same sum to the same person, for the same cause, are to be construed as substitutionary and not cumulative, and on the other side that they are an exception from that rule. It is very difficult, to my mind, to apply that rule. I do not know exactly what is meant by the expression "the same cause," as used in the rule. When a man leaves a legacy to a child it is because he is a child, if he leaves a legacy to a friend it is because he is a friend that he gives it. Perhaps the same might be said of every case of testamentary bounty, except the giving a certain sum to an executor for his trouble as executor. I really do not know how to apply the rule, and at all events I am unable to see any reason whatever to dissent from the conclusion which the Vice-Chancellor came to, that the servants are entitled to the additional bounty in the same manner as the friends are. That being the view I have arrived at, it is not necessary to go through the long roll of cases that have been cited to us. Two, however, I will mention. One is the *Duke of St. Alban's* v. *Beauclerk* (1), in which there were some similarities to the present case. Upon careful consideration of that case it appears that there were a great number of *indicia* by which the Court was enabled to arrive at the conclusion that substitution was intended, and the Vice-Chancellor *Wigram* has also pointed out, in *Lee* v. *Pain* (2), that the *ratio decidendi* there was, that the peculiar mode in which the will referred to the codicil and the codicil referred to the will, brought the case within the rule applicable to gifts in the same instrument. The other is *Hemming* v. *Clutterbuck* (3), which the Vice-Chancellor had decided (4) as a very clear case in favour of substitution. Lord *Eldon*, however, in moving the judgment of the House of Lords, expressed his opinion that it was one of the most difficult cases he had ever had to deal with, and then proceeded entirely, or almost entirely, upon the fact that the two instruments were admitted to probate by the Ecclesiastical Court as one will, and that the second instrument began with the words, "This is my last will and testament," from which he derived the conclusion that it was intended to be substitutional. I cannot help thinking that in both these cases, however, the Court of construction acted upon a sort of feeling that, in truth, the one instru-

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(1) 2 Atk. 636.

(2) 4 Hare, 201.

(3) 1 Bli. (N.S.) 479.

(4) 2 S. & S. 311.

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ment was intended to be an entire substitution for the other. These cases are so entirely distinct from this, that I do not think it necessary to make any further observation upon them. I would only add this, that I cannot help feeling that this case has occupied more time than it would have done if I had throughout confined myself strictly to that which is my legitimate duty, that is, if instead of endeavouring to find out what the testator meant I had confined myself to endeavouring to ascertain what was the meaning of the testamentary papers which he left behind him.

I ought to add that we are clearly of opinion that the letter from the solicitor is wholly inadmissible for any purpose whatever. The question being a mere question of construction of the documents, nothing that was contained in a letter from the solicitor to the testator, whether by way of advice or statement, or anything else, is, in our judgment, legitimately admissible for the purpose of such construction. Therefore we have as entirely discharged our minds of that letter as if we had never heard of its existence.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors: Messrs. *Stephens & Langdale;* Messrs. *Nicholl, Burnett, & Newman;* Messrs. *Williams & James.*

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March 13, 14.

COMMISSIONERS OF SEWERS OF THE CITY OF LONDON *v.* GLASSE.

[1871 L. 127.]

Pleading—Parties—Multifariousness—Right of Common.

19 Eq 146

Ch D. 611-2.-3,

QBD 445-6

453

Ch D 656

Ch D 378

The Plaintiffs filed their bill on behalf of themselves and all other the owners and occupiers of lands within the *Forest of Essex*, other than the waste lands of the forest, except such of them as were Defendants, or alleged to be represented by the Defendants, against the lords of the several manors within the forest and two persons who claimed to be owners and occupiers of portions of the waste lands which had been inclosed, and the Attorney-General. The Plaintiffs alleged that they were owners and, as to part, occupiers of a farm within the forest; that the whole of the forest was subject to rights reserved by the Crown on granting the manors, and that

[illegible] A.G. L.R. 15 Eq. 802 M.R.

[illegible] heard when decree made for A.G.

L.R. 19 Eq 134 M.R.

QBD 664-8, 750-2

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the Crown had reserved an absolute right of disposition over the herbage; that the lords of manors within the forest could not inclose with the consent of their respective homages without license from the Crown; that the government of the forest was formerly administered by forest Courts, whose jurisdiction embraced all matters touching the preservation of the rights of the Crown in the forest; that by virtue of ancient forest laws made by the Crown, the owners of lands and tenements within the forest had enjoyed rights of common of pasture over the wastes of the forest; that such rights had from time immemorial been enjoyed by the owners and occupiers of such lands and tenements, without regard to the boundaries of the manors or parishes in which the lands and tenements were situate; and that the Plaintiffs and their predecessors in title, and their tenants, and the other owners and occupiers of lands and tenements within the forest, had from time immemorial enjoyed as of right by virtue of the said forest laws, as appendant or appurtenant to their respective lands and tenements, common of pasture, for cattle, levant and couchant, on their respective tenements, over the waste lands of the forest. The bill prayed for a declaration of the right claimed, and for an injunction restraining the Defendants from inclosing any of the waste lands, and from allowing any parts which had been already inclosed to remain so:—

Held (affirming the decision of the Master of the Rolls), that the right alleged was one which might exist by law, and was sufficiently pleaded; that the bill was not objectionable as being on behalf of occupiers as well as owners; that the persons who claimed to be owners of the lands alleged to have been improperly inclosed were sufficiently represented; and that as the bill was filed to establish one general right, the Defendants could not successfully demur on the ground that they might have separate defences.

THIS was an appeal by the Defendant *Glasse*, and three other of the Defendants, from an order of the Master of the Rolls overruling a demurrer to the Plaintiffs' amended bill.

The original bill was filed by the Plaintiffs on behalf of themselves and all other the owners and occupiers of lands and tenements lying within the *Forest of Essex* except the Defendants thereto, against the lords of divers manors within the forest and the Attorney-General. The substance of the statements was as follows:—

That the *Forest of Essex* was situate in that county, and contained large tracts of waste land, and included the manors of *Aldersbrook, Wanstead*, &c.

That the said forest was a royal forest.

That the Plaintiffs were seised of a farm called *Aldersbrook* within the boundaries of the forest, and that such farm was partly in their own occupation.

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That the Defendants *Glasse* and *Collyer-Bristow* were, or claimed to be, lords of the manor, or reputed manor, of *Aldersbrook*, and of the several manors of *Wanstead* with *Stonehall*, *Woodford*, and *Ruckholts*. The bill went on with similar allegations as to each of the other Defendants, except the Attorney-General, that they were, or claimed to be, respectively lords of the other manors respectively mentioned in the bill and included in the forest.

5. That the whole of the inclosed, as well as the waste, lands within the forest had been from very ancient times subject to rights reserved by the Crown on the grants of the several manors and lands lying within the forest, for enabling the Crown to maintain the forest as a royal forest for hunting, and subject also to the ancient forest laws made from time to time for enforcing and regulating those rights; and that the Crown so reserved and had from time immemorial claimed and exercised for those purposes an absolute right of disposition over the deer and certain other wild animals within the forest under the name of venison; and over the woods, underwoods, and coverts under the name of vert; and over the pasture, turf, gravel, and soil of the waste lands in the forest.

6. That the government of the forest was formerly administered by the Lord Warden of the Forest and other subordinate officers, and that the forest laws were executed by the forest Courts, which consisted of the Court of the Chief Justice in Eyre, the Swanimote Court, and the Court of Attachments, or Forty-Day Court, of which two last-mentioned Courts four verderers, elected by the freeholders of *Essex*, ought to be the judges. That the jurisdiction of these Courts embraced all matters touching the preservation of the rights of the Crown in the forest, to which rights the manorial, common, and other rights within the limits of the forest were subordinate. That the offices of Lord Warden of the Forest and of Chief Justice in Eyre had been abolished, and that the powers belonging to those offices were vested in the First Commissioner of Woods and Forests, who, however, had not exercised, and refused to exercise, the same. That there had for many years been only one surviving verderer, and that a writ had lately been issued for the election of three others to fill up the vacancies, and that three persons had been declared elected, but that the election of two of them was informal and void.

7. That the owners of lands within the bounds of the forest were restricted by the forest laws from the full use and enjoyment of their lands, and amongst other things were prohibited from inclosing their lands with fences above a certain height, or made so as to impede the free passage of wild animals through the forest, and were subject to various burdensome restrictions.

8. That the forest laws also forbade the inclosure of any of the waste lands within the forest, and the erection of any fences or obstructions thereon; and that the lords of the manors within the forest were not, nor ever were, able of their own authority, or merely by the consent of the homages of their respective manors, to inclose any part of the waste lands of their respective manors lying within the forest, nor could any such inclosure lawfully be made in prejudice of the rights and privileges existing within the forest, or without a license under the authority formerly vested in the Chief Justice in Eyre granted upon the certificate of two or more of the verderers, and subject to the proviso that the inclosures thereby authorised be not prejudicial to the forest or to the rights of the Crown in vert and venison.

9. The owners of lands and tenements within the royal forests, and particularly within the said forest, by virtue of ancient forest laws made by the Crown in exercise and derogation of its said forest rights, and recognised and confirmed by divers statutes of the realm, have, from very ancient times, enjoyed, and still ought to enjoy, by way of compensation for the burdens and restrictions so imposed upon them by the said forest laws (amongst other rights and privileges), rights of common of pasture over the waste lands within the said forests, subject to regulations from time to time made and enforced by the said forest Courts. [Several ancient charters were referred to in support of this.]

10. The rights of common of pasture so granted or permitted as aforesaid have from time immemorial been enjoyed by the owners and occupiers of lands and tenements lying within the forest, whose cattle have always been depastured on such of the wastes of the said forest as for the time being have been found most convenient, without regard to the boundaries of the parishes or manors in which their lands and tenements were situate, and subject only to the regulations made by the said forest Courts, and particularly by

the Court of Attachments. [Various old presentments and orders were referred to in support of this.]

12. The Plaintiffs and their predecessors in title and their respective tenants, and the other owners and occupiers of lands and tenements lying within the said forest, had in fact from time immemorial enjoyed, as of right and without interruption, by virtue of the said forest laws, as appendant or appurtenant to their respective lands and tenements lying within the said forest, common of pasture for all manner of cattle commonable within the said forest, levant and couchant, upon their respective tenements, over the waste lands of the forest.

13. That the Defendants, as lords of the said manors or reputed manors respectively, or in some other capacity, pretended to be entitled to inclose the waste lands of the forest, and to dig up and destroy the herbage, and had respectively, during the last few years, inclosed, or authorized or sanctioned the inclosure, of large tracts of the wastes.

[The bill then proceeded to specify inclosures made by the several Defendants, amounting in the whole to nearly 3000 acres, and also acts of destruction as related to the herbage.]

15. That the inclosures and other acts complained of were purprestives and encroachments on the forest, and that the Plaintiffs and the other persons entitled as aforesaid were by reason thereof deprived of or impeded in the use of their common rights over the waste lands. That the Defendants alleged that they respectively, and their respective predecessors in title, had sold and conveyed to various persons, of whose names the Plaintiffs were ignorant, divers pieces of the lands which they had so inclosed, and that buildings had been erected on some parts of the said lands; but a considerable part of the lands so inclosed were still in the possession of the Defendants respectively. That, under the circumstances aforesaid, the Plaintiffs could not procure the said purprestives and encroachments to be abated without the assistance of the Court.

16. That the Crown rights of forest over some of the inclosed and waste lands within the forest had been sold under statutory powers, but the Crown rights of forest had never been extinguished; and as to the greater part of the forest, they were still vested in

the Crown, and the sales had not, as against the Plaintiffs or the persons on whose behalf they sued, disafforested any part of the forest, or affected their rights of common.

17. That the other owners and occupiers of lands and tenements in the forest who were entitled to common rights were too numerous to be made parties to the suit, but had a common interest with the Plaintiffs, and concurred in asking the relief prayed by the bill.

19. That the Attorney-General claimed on behalf of the Crown an interest in the matters in question in the suit, and was a necessary party.

The bill prayed for a declaration that the Plaintiffs and the other owners and occupiers of lands and tenements within the forest were entitled, in right of, and as appendant to, their several lands and tenements within the forest, to a right of common of pasture upon all the waste grounds within the forest for all manner of cattle commonable within the forest, levant and couchant upon their respective lands and tenements within the forest, and for an injunction to restrain the Defendants from inclosing or building upon, or suffering to remain inclosed or built upon, any part of the waste lands of the forest which were subject to the commonable rights, and from digging up or destroying the soil of the waste lands or the herbage thereon.

The Defendants, *Glasse*, *Collyer-Bristow*, and two others, put in a demurrer to the bill, first, for want of equity; secondly, for that it appeared by the Plaintiffs' own shewing that they could have relief under the jurisdiction of the forest Courts; and thirdly, for that the bill was exhibited against these Defendants and the several other Defendants for distinct and independent matters and causes, with the greater part of which these Defendants were not concerned, and was multifarious. The other Defendants also demurred. The Master of the Rolls overruled the above grounds of objection, but allowed the demurrer with leave to amend, on a ground which was taken in the demurrer of the Attorney-General, and *ore tenus* by the other demurring parties, that the persons who had become owners of the inclosures which it was sought to abate were not made Defendants nor excepted from the class of persons on whose behalf the Plaintiffs sued.

The Plaintiffs amended their bill, making it a bill "on behalf of themselves and all other the owners and occupiers of lands and tenements lying within the *Forest of Essex*, other than the waste lands of the said forest, except such of them as are Defendants hereto, or are hereinafter alleged to be sufficiently represented by the Defendants hereto, or some of them." They also added as Defendants two gentlemen named *Lake* and *Williams*, and amended the 15th paragraph by inserting after the general statement as to sale of inclosed lands and buildings thereon a statement that in particular *Glasse*, *Collyer-Bristow*, and *Lake* alleged, as the facts were, that *Glasse* and *Collyer-Bristow*, or their predecessors in title, had sold or conveyed to *Lake* a piece of inclosed waste land specified in the bill, which was in the occupation of *Lake*, who claimed to be the owner of it by virtue of such grant or conveyance. [There followed a precisely similar allegation as to a grant by the lord of another manor to *Williams*.] That the names of the other persons to whom portions of the inclosed waste lands were alleged to have been sold and granted or conveyed, and who claimed to be owners of such waste lands, and of the other persons (if any) who claimed to be owners of waste lands within the forest, were unknown to the Plaintiffs, and could not be ascertained by them without a discovery from the Defendants; but the said persons were too numerous to be made parties to the suit, and were sufficiently represented by the Defendants, or some of them.

Some trifling amendments consequent on the above were made in other parts of the bill, which need not be specified.

The Defendants again demurred, and the demurrers were overruled by the Master of the Rolls.(1) *Glasse* and *Collyer-Bristow*, and the other two Defendants who had joined in their demurrer, appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Southgate*, Q.C. (Mr. *Nalder* and Mr. *Robinson* with them), for the Appellants:—

First: We contend that the right claimed by the Plaintiffs is one which cannot exist by law. The lord of a manor may approve, leaving enough common, or if the homage consent, without leaving enough common.

[The Lord Justice Mellish:—May not the Crown have

(1) See W.N. (1872) 18.

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granted the rights of common before it granted the manors? The manors might have been granted at any time down to the statute of *Quia Emptores.* If the rights of common were granted before the manors, the lords of the manors would take subject to the rights of common.]

Boulcott v. *Winmill* (1) is an authority in favour of the lord of the manor. The Plaintiffs seek to escape from the common law by the allegation of a general forest law, but no such law exists.

Secondly: The suit is improperly constituted as to parties. The bill is filed on behalf of the owners and occupiers. Now a bill on behalf of the occupiers could not be sustained, for it is a claim to a profit *à prendre in alieno solo,* which cannot be vested in a body of occupiers by custom, prescription, or grant: *Gateward's Case* (2); *Grimstead* v. *Marlowe* (3); *Attorney-General* v. *Mathias* (4). The occupiers have distinct interests from the owners, and ought to be separately represented. Then as to inclosure being prohibited by the forest laws, *Boulcott* v. *Winmill* shews that the law is contrary to the statement in par. 8 of the bill.

[The LORD JUSTICE JAMES:—No question as to a right over the whole forest was in issue there.]

Thirdly: We say that it appears on the face of the bill that the forest Courts have exclusive jurisdiction.

[The LORD JUSTICE JAMES:—*Boulcott* v. *Winmill* is against you there.]

Fourthly: The bill is multifarious. Each Defendant has a separate defence, and the cases of all cannot be united in the same record.

[The LORD JUSTICE JAMES referred to *Mitford* on Pleading (5), and *Mayor of York* v. *Pilkington* (6).]

Mr. *Joshua Williams,* Q.C., Mr. *Fry,* Q.C., Mr. *Speed,* and Mr. *W. R. Fisher,* for the Plaintiffs, were not called upon.

(1) 2 Camp. 261.
(2) 6 Rep. 59, b.
(3) 4 T. R. 717.
(4) 4 K. & J. 579. 4 Jur N.S. 128.
(5) 4th Ed. p. 182
(6) 1 Atk. 282.

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SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls overruling this demurrer is quite right.

The bill seems to me to be quite in accordance with a great number of precedents, with the case to which I referred more than once in the course of the argument, and with the principle laid down by Lord *Redesdale* in his work on Pleading. It is the case of a bill filed by a person or persons claiming a general right, against several persons claiming several rights, to have that general right ascertained. To determine whether there is any foundation for this claim, we of course, on the present occasion, must take the allegations in the bill as being admitted, and if those allegations are well founded, and can be proved by sufficient evidence, it seems to me that it is far better that the whole case should be tried in a Chancery suit, in which all persons interested in disputing the right claimed by the bill can join in making a defence—the costs of which, if they combine, cannot be very oppressive, and where the general right can be tried once for all as between the persons interested on the one side and the persons interested on the other side—than that it should be tried by the only other proceedings I know of. One of such proceedings would be the bringing actions against every one of the trespassers for the disturbance of the rights of common. If it was done in that way there might be thousands of actions brought, because every one of the occupiers claiming the right of common could bring an action against every one of the persons who has made an encroachment. The only other proceeding would be that if the inclosures are an encroachment and a nuisance to the forest, a person entitled to common might, if he could do it without committing a breach of the peace, sweep away the walls, hedges, and fences, and put the occupiers to bring actions for trespass. Supposing that course to be resorted to, the commoner, if reasonable, would give notice that he was going to demolish the fences, and then the lord or the tenant who was threatened might file his bill to restrain him from doing so, and no doubt the destruction of property would be restrained by this Court; but of course only in such a way as that the real question should be tried in the suit in which the injunction was obtained.

There seems to me to be every principle in favour of such a bill as this. I cannot distinguish it from the case to which I have referred, the case of a general right of fishery claimed against several owners, occupiers, and others down a river; or the case with which we used to be more familiar in these Courts, the case of a bill filed by a great number of owners and occupiers of lands to establish a parochial or district *modus*.

Then it is said that this is a very large district. Of course the fact that the district is large may possibly throw a greater difficulty in the way of the Plaintiffs' proving the existence of a right of common extending over the whole of that district. But if this right of common is a right of common extending over the whole of the district, I do not see how the Plaintiffs could allege any other right, or deal with it except upon the footing that, as the right extended over the whole district, they must bring here all the persons in the district who were interested in opposing that right.

Then it is said that the allegations are not sufficient, that is to say, that the allegation of title to the right of common is on behalf of owners and occupiers. *Gateward's Case* (1) and other cases have been cited for the purpose of shewing that no such right as this can be claimed by custom. Of course it is settled and clear law that you cannot have any right to a profit *à prendre in alieno solo* in a shifting body like the inhabitants of a town or residents of a particular district. But, construing the allegations here according to their plain meaning, it appears to me that if they were judged most strictly, the allegation here is of a right of common in the owners and occupiers of lands in respect of those lands; for it is in express terms claimed as a right of common, either appendant or appurtenant, for their cattle, levant and couchant, upon the tenements. That is an allegation of a right of common not unknown to the law—a right of common which is alleged as being appurtenant to land, and of course claimed by persons who are either owners or occupiers of the land in respect of which that easement is claimed. It appears to me that the occupiers have a right to join, and to be joined, in any suit in this Court for that purpose. The occupier alone is entitled during the

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(1) 6 Rep. 59, b.

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continuance of his occupancy; he may be an occupier for a long term of years, and he may be the only person substantially interested in the assertion of the right. Therefore I cannot conceive that there is any objection to joining owners and occupiers in this way in their character of *quasi* co-Plaintiffs, and as persons on behalf of whom the right is alleged.

Then it is said that the suit is multifarious. The answer to that appears to me to be the one which I have already given from Lord *Redesdale's* book, that is to say, although the Defendants may possibly have several and distinct rights, the right put in issue by the bill is one general right which all these persons are interested in disputing.

Then it was contended that this Court had no jurisdiction. I must confess that I could not follow that argument. It is alleged in the bill that the forest Courts had jurisdiction to do certain things, but there is no allegation in the bill in which it is said, or from which it should be inferred, that the forest Courts had any exclusive jurisdiction, or that there was any law of the forest or otherwise which prevented this Court from having jurisdiction to entertain a bill with respect to a right of this kind.

Then it was said that there were not sufficient persons here to represent all the interests. There is no person that I am aware of whose absence in any way prevents any Defendant making his full defence, or any person whom the Defendants have a right to call to assist them in their defence. The lords of the manors, of course, will make their case; the two occupiers and owners of inclosures who are brought before the Court will make their case.

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It is said that the decision of this Court may prejudice people who are absent. That is a question for these people and not for the Defendants. They do not represent them, and they are not the protectors of those persons who are absent. It will only prejudice them in exactly the same way as an action against one of the tenants. Supposing an action had been brought by one of the commoners against one of the encroachers, and a verdict obtained—that, of course, to a great extent, practically would prejudice every one else, and to that extent a decree here might prejudice persons who are absent. But of course no proceedings here will ever be a *res judicata* against a person who is not present to defend himself, and it will be open to him to make any defence afterwards. At all events, that is an objection which would be for them to take, and which does not appear to me to lie in the mouth of any of the Defendants. Therefore, upon the whole, I am of opinion that the Master of the Rolls was quite right in overruling this demurrer. I think it is very much better that the case should be tried on the merits and evidence than that these technical difficulties should be constantly raised. I am of opinion that the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The question in substance is, whether the right alleged in the bill is one which by law can possibly exist. If the right alleged in the bill could not have a legal existence, it would be right to stop the suit at the earliest stage. Now, the right alleged in the bill is, in my opinion, a right on the part of all the owners of lands in the forest, for themselves and their tenants, occupiers of lands in the forest, to common over the wastes of the forest. I can see no reason why that right may not have a legal existence. I think it is possible that the King at the time when the forest was originally formed might have created that right. If, at the time when the forest was originally formed, the land was the property of the Crown, I cannot see why the King, when he formed the manors, might not have granted to the lord of each manor, for himself and his tenants, a right of common over all the wastes of the forest; or if the lands were not the lands of the Crown at the time when the forest was formed, then the forest might have been formed with the consent of the owners of the land over which the forest was formed, because, in point of law, the King could not make a man's land into forest without some agreement or consent from him. Then it may have been part of the arrangement by which the forest was formed that all the owners of lands within the forest were to have rights of common over the wastes of the forest. I am of opinion, therefore, that the right is one which legally may exist.

The main objection which was taken was, that the right was alleged in the occupiers, and that the occupiers could not have such a right. There is no doubt that the occupiers, simply as such, could not have the right; but, looking at the allegations in the bill, it appears to me that the right is substantially alleged in the owners on behalf of themselves and the occupiers. The 9th paragraph of the bill begins by stating what the right is. [His Lordship read so much of paragraphs 9 and 10 as is set out above.] That seems to me to be perfectly accurate. The rights granted to the owner have been enjoyed by the owner and occupier. Of course the occupiers are the persons who *de facto* enjoy the right, although that right is gained to them through its belonging to the owner from whom they get their estates. [His Lordship then read the 12th paragraph.] There, it appears to me, the right is perfectly accurately laid as a right. When the bill mentions "the Plaintiffs and their predecessors in title and their respective tenants," and then adds, "and the other owners and occupiers," I think that clearly means the other owners and their tenants under them. Therefore it appears to me that the right in that respect is quite rightly laid.

Then it was said that the right is here claimed by virtue of the forest laws, and that we ought to take judicial notice that there are no such laws. But when the bill speaks of forest laws, it only means regulations or grants made by the King in respect of the forest; and I am not aware of any authority that we are bound to take judicial notice, or can take judicial notice, of what those laws were. They are not rules of the common law nor Acts of Parliament, but they are regulations made by the Crown for the government of the forest.

Then it was said that those forest laws ought to be produced, and that they are not set out. In my opinion when the parties are relying upon rights which came into existence before the time of legal memory, it is not necessary to produce the original law or the original grant, but it may be proved to have existed by shewing that enjoyment has been had of such rights from time immemorial; and if that enjoyment can only legally be accounted for by the assumption that the King did make such a regulation, and that such a regulation was part of the forest law, I apprehend the proof of the enjoyment would be proof that there was such a law. Therefore it appears to me that the case raised by the bill is one capable of being proved at the hearing, and that that is sufficient for our judgment upon the present occasion. I do not think it necessary to add anything respecting the minor matters which were mentioned.

Solicitors: Messrs. *Horne & Hunter;* Messrs. *Collyer-Bristow, Withers, & Russell.*

HAIGH *v.* KAYE.

[1869 H. 115.]

L. JJ.
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April 18, 19.

Voluntary Conveyance—Resulting Trust—Statute of Frauds—Illegality—Pleading.

A Defendant who wishes to rely on the illegality of a transaction as a defence must plead it in distinct terms.

The *Statute of Frauds* cannot be used by a Defendant to cover a fraudulent act.

The Plaintiff conveyed an estate to the Defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by the Defendant; but no purchase-money actually passed, and the Plaintiff alleged that he conveyed the estate to the Defendant as a trustee for him. The Defendant, in his answer, admitted that he gave no consideration for the estate, but stated that the Plaintiff made the conveyance fearing that an adverse decision would be made against him in a suit then pending in Chancery; and that it was understood that the Defendant should account to the Plaintiff for the rents until he could make arrangements for paying the purchase-money, and if no such arrangements could be made, that he should reconvey the estate. The Defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the *Statute of Frauds*:—

Held, first, that there was no sufficient averment that the transaction was an illegal one:

Secondly, that the *Statute of Frauds* could not be pleaded in answer to the Plaintiff's claim; and that as the evidence did not establish the existence of any such agreement as was alleged by the Defendant, the Defendant must reconvey the estate to the Plaintiff.

Decree of the Master of the Rolls affirmed.

THIS was an appeal from a decree of the Master of the Rolls.

On the 8th of December, 1860, the Plaintiff, *G. A. Haigh*, conveyed a freehold estate, called the *Thorncliffe* estate, to the Defendant, *Robert Kaye*, in consideration of the sum of £850.

Although that sum was expressed in the deed to be paid by the

Defendant to the Plaintiff, the money was in fact the Plaintiff's money, and he handed it to the Defendant in order that it might be repaid as the nominal consideration for the conveyance. Under these circumstances the Plaintiff alleged that the estate was conveyed to the Defendant as a trustee for him.

On the 23rd of November, 1867, disputes having arisen between the Plaintiff and Defendant, an agreement was signed by them to refer all matters in dispute respecting the transfer of the *Thorncliffe* estate and other money transactions to arbitration; but the Defendant subsequently withdrew from the arbitration and no award was made.

The Plaintiff having applied to the Defendant to reconvey the estate, and the Defendant having refused, the Plaintiff filed his bill praying that the Defendant might be declared to be a trustee for the Plaintiff of the *Thorncliffe* estate, and might be directed to convey it to him.

The Defendant in his answer said as follows:—

"Near the end of the year 1860 the Plaintiff, who is my brother-in-law, being a party to the suit of *Haigh* v. *Haigh*, then pending in this Honourable Court, and fearing an adverse decision in such suit, made overtures to me for the sale of the said estate; but I was unable at that time to withdraw from my business the money required to pay for the purchase thereof. The Plaintiff had previously, as I believe, attempted to sell the said estate to another person, who, however, declined to give more than £600 for it. The Plaintiff then, being desirous to sell the said estate for the reasons above referred to, and being also desirous that I should purchase such estate, and that the same should be vested in me (but not, save as appears by this my answer to the statements contained in other parts of it to which I refer, as trustee for the Plaintiff), induced me to take a conveyance thereof, it being understood that I should account to the Plaintiff for the rents and profits until such time as I could make arrangements for purchasing or paying the purchase-money for the property; and, in fact, by a deed bearing date on or about the 8th day of December, and in consideration of the sum of £850 therein expressed to have been paid by me to the Plaintiff, the Plaintiff did convey the said estate to me, my heirs and assigns. . . . . . I admit that it was intended that I should convey the estate to the Plaintiff when he should desire me to do so, unless arrangements were completed for the purchase or payment of the purchase-money by me, and that in the meantime I should, until such arrangements were finally made, account to the Plaintiff for the rents and profits of the property."

The Defendant also stated as follows:—

"The rents and profits of the said *Thorncliffe* estate have been received by me since the date of the said conveyance, and I have accounted to the Plaintiff for the same, or at all events for the amount thereof up to the 3rd of February, 1863, when the arrangements for purchasing the property and paying the purchase-money therefor were finally settled."

The Defendant also alleged that he had expended several hundred pounds of his own money on repairs and improvements on the property. He now claimed to hold the estate as his own, discharged from any trust for the Plaintiff; and he claimed the benefit of the *Statute of Frauds.*

In his affidavit in support of his case the Defendant said: "On the 3rd of February, 1863, the arrangement for my purchasing the *Thorncliffe* estate was completed by my agreeing to pay, and by the Plaintiff agreeing to accept, the sum of £800 for such estate. It was arranged between us that this sum should be paid by instalments, as I could spare the money from my business. I paid the full amount of such purchase-money by instalments between the 11th of February, 1863, and the 29th of January, 1867. I also paid divers sums of money to various persons by the order and direction of the Plaintiff; and for other moneys due to me on the settlement of account with the Plaintiff I take credit."

The Master of the Rolls declared that the Defendant was a trustee of the *Thorncliffe* estate for the Plaintiff, and ordered an inquiry what sums had been received by the Defendant on account of the rents and profits, and of his application thereof, and also what sums had been properly expended by him in permanent improvements on the estate, or in the management thereof, and declared that the Defendant had a charge on the estate for the amount (if any) which was due to him; and he ordered that, without prejudice to the lien, the Defendant should convey the estate to the Plaintiff.

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The Defendant appealed from this decree. After the institution of the suit the Plaintiff *G. A. Haigh* died, and the suit was revived by his son, the present Plaintiff.

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, for the Appellant:—

We contend, in the first place, that if the conveyance was meant to be in trust for the Plaintiff, it was fraudulent and void as being for the purpose of evading the effect of the expected decision in the pending suit. Where a conveyance has been made for an illegal purpose the Court will give no relief except in cases where there has been a mistake or misapprehension: *Birch* v. *Blagrave* (1); *Davies* v. *Otty* (2); *Childers* v. *Childers* (3).

In the second place, we rely upon the *Statute of Frauds.* No trust was declared in writing at the time, and we claim to hold the *Thorncliffe* estate discharged from any trust. It is true that the Defendant admits in his answer that he was to hold it for a certain time in trust for the Plaintiff; but a Defendant may admit a parol trust, and at the same time take advantage of the *Statute of Frauds*: *Mitford* on Pleading (4).

[SIR W. M. JAMES, L.J.:—Lord *Redesdale* is there speaking of a parol contract. Has that rule ever been applied to a parol trust?]

There is no distinction in the statute between a contract and a trust. If a Plaintiff can evade the statute by interrogating the Defendant, the statute would have very little operation. The only exception in the *Statute of Frauds* is in favour of resulting trusts. A resulting trust arises in two cases: first, where a man purchases in the name of another there is a resulting trust for the purchaser; secondly, where a trust is declared of part of an estate there is a resulting trust as to the rest. But no resulting trust is raised merely because there is a conveyance without any consideration: *Saunders* on Uses (5); *Lloyd* v. *Spillet* (6).

Mr. *Fry*, Q.C., and Mr. *T. C. Wright*, for the Plaintiff, were not called on.

(1) Amb. 264.
(2) 35 Beav. 208.
(3) 1 De G. & J. 482. 3 Jur N.S. 277
(4) 5th Ed. p. 31~~0~~ 1/
(5) 5 Ed. p. 356.
(6) 2 Atk. 14~~6~~. 8/

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6 P C 142

SIR W. M. JAMES, L.J.:—

I am of opinion that the decree of the Master of the Rolls must stand.

The Defendant admits that there was a conveyance given to him purporting to be executed in consideration of £850 paid by him to the original Plaintiff, *G. A. Haigh*, by which he became, by purchase, owner of the estate. He admits that there was no such transaction in fact as any sale to him, but that the payment of the £850 was a mere form, and that the Plaintiff paid the expenses of the conveyance to him, or gave him the money to pay them. That being so, he goes on to admit that he was to hold the estate upon trust to pay the rents and profits to the Plaintiff, and when the Plaintiff called upon him for a reconveyance he was to reconvey it. The Plaintiff has called upon him to reconvey the estate, and he suggests by way of answer to that, first of all vaguely and faintly, that this transaction was not altogether a straightforward transaction; that this transaction was entered into with a view to defraud somebody else. The Defendant says in effect, "I am to remain in possession of the estate, because we were both of us engaged in a transaction contrary to the law, and you will not take it away from me to give it to a man who was as bad as I was in the matter; in fact it was an illegal and fraudulent transaction against somebody else, and where there is an equal crime the Court ought to hold that *in pari delicto melior est conditio possidentis.*" However the Defendant has not raised that defence in the way in which, according to my judgment, such a defence ought to be raised. If a Defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. Here he has simply said that the Plaintiff, fearing an adverse decision in the suit of *Haigh* v. *Haigh*, conveyed the property to him. I think that is not sufficient.

The next objection taken was upon the *Statute of Frauds.* The Defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the *Statute of Frauds,* and claims the estate as a right. Now

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the *Statute of Frauds* no doubt says, that a person claiming under any declaration of trust or confidence must shew that in writing; but the statute goes on to say that no resulting trust, and no trust arising from operation of law, is within that enactment. I apprehend it is clear that the *Statute of Frauds* was never intended to prevent the Court of Equity from giving relief in a case of a plain, clear, and deliberate fraud. The words of Lord Justice *Turner*, in the case of *Lincoln* v. *Wright* (1), where he said, "The principle of this Court is that the *Statute of Frauds* was not made to cover fraud," express a principle upon which this Court has acted in numerous instances, where the Court has refused to allow a man to take advantage of the *Statute of Frauds* to keep another man's property which he has obtained through fraud. It is difficult to distinguish this case from that of *Childers* v. *Childers* (2). It is consistent entirely with *Davies* v. *Otty* (3), which does not seem to me to carry the matter at all further than the decision of Lord Justice *Turner* in *Lincoln* v. *Wright*, where the *Statute of Frauds* was attempted to be set up in the same way by a man who claimed to take under an absolute conveyance instead of a mortgage.

That being so, the *Statute of Frauds* and the ground of supposed illegality of the whole transaction being set aside, the Defendant comes into possession of this property as a trustee for the Plaintiff. Then he says that although he was made a trustee there was a talk about his becoming the purchaser. He does not pretend to say that at that time there was any bargain, but he says that it was understood, before he was called upon to reconvey the property, that if he could make an arrangement to purchase it he was to have it.

[His Lordship then referred to the statements in the Defendant's answer, and to the evidence on this subject, and continued:—]

There is no direct evidence in writing in support of the Defendant's contention, and it appears to me that the correspondence which passed between the Plaintiff and Defendant with reference to the arbitration is inconsistent with the existence of any such agreement. I am of opinion that the Defendant has failed to prove his case, and therefore that the decree is quite right in declaring that he is to be treated as a trustee of the property, and must reconvey it to the representatives of the original Plaintiff.

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(1) 4 De G. & J. 16. 5 Jur NS 1142 (2) 1 De G. & J. 482 5 Jur NS 112
(3) 35 Beav. 208.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Plaintiff: Messrs. *Edwards, Layton, & Jacques,* for Messrs. *Iveson & Meller, Holmfirth.*

Solicitors for the Defendant: Messrs. *Gregory, Rowcliffes, & Rawle,* for Messrs. *Kidd, Jessop, & Armitage, Holmfirth.*

ATTORNEY-GENERAL *v.* GREAT EASTERN RAILWAY COMPANY.

[1871 A. 123.]

L. JJ.
1872
April 22.

10 CLD 5
528

Railway Company—Parliamentary Power—Deposited Plans—Stopping up Streets—General Act—Special Act.

A railway company deposited with the clerk of the peace plans and sections of a railway and station which they intended to obtain power to make, shewing that they proposed to stop up certain streets, but proposed to cross *Sun Street* on an arch. The Act which the company obtained referred to the plans and sections, but gave the company power to stop up all the streets within a certain defined area, which included *Sun Street*:—

Held (reversing the decision of *Bacon*, V.C.), that the company had power to stop up *Sun Street*:

Held, also, that the 13th and 14th sections of the *Railway Clauses Consolidation Act*, 8 Vict. c. 20, were controlled by the section in the special Act which gave power to stop up the streets within the defined area.

Affirmed LR 6 HL 367

THIS was an information against the *Great Eastern Railway Company*, at the relation of the Commissioners of Sewers of the City of *London*, to restrain the railway company from stopping up a street called *Sun Street*.

In 1863 the *Great Eastern Railway Company* gave to the commissioners notice of their intention to apply to Parliament for power to build a station on a certain area bounded on the north by *Sun Street*, and for power to stop up all streets within that area. The company did apply for a bill accordingly, and de-

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posited plans shewing that *Half Moon Street* and other streets would be stopped up, but shewing that two streets called *Liverpool Street* and *Sun Street* would be crossed by the railway on arches, the dimensions of which were given on the plans. But by the Act which the company obtained in 1864 (27 & 28 Vict. c. cccxiii.) they were empowered to make and maintain (amongst other things) a railway commencing at a point north of *Sun Street* and ending at a point south of *Sun Street;* and in the preamble to the Act was a recital that it was expedient that the company should be authorized to purchase all the lands and buildings in the City of *London* comprised "within an area bounded on the northern side by the properties numbered, &c., in the parish of *St. Botolph, Bishopsgate*, on the deposited plans hereinafter referred to on the western side," &c. (which area extended north and south of *Sun Street*, and of course included *Sun Street*,) and to stop all streets and highways within the said area, and to appropriate the site of such area for the purposes of a railway station.

By sect. 1, the *Railway Clauses Consolidation Act*, 1845, was incorporated with this Act.

By sect. 6, after reciting that plans and sections of the proposed railways, shewing the lines and levels thereof respectively and of the intended station, had been deposited with the clerk of the peace, it was enacted that, subject to the provisions and powers of deviation in that Act and the Acts incorporated therewith contained, the said railways should be made in the line or within the limits of deviation and upon the lands delineated on the said plans and according to the levels defined on the said sections.

By sect. 7 the company were to commence with that part of the works which was between *Liverpool Street* and *Sun Street* (being to the south of *Sun Street*).

By sect. 8 it was enacted, that the company might "stop up and cause to be discontinued as public highways all streets and highways within the area hereinbefore described as the site of the intended station, and may appropriate the site of such streets or highways to the purposes of such station."

The company took no steps towards constructing this railway or the station; and by an Act obtained in 1870, 33 & 34 Vict. c. li. (which recited that plans and sections had been deposited), the company were authorized to purchase lands for the construction of a terminal station at *Liverpool Street*, which is south of *Sun Street*, and to stop up and acquire the sites of certain courts and alleys north of *Sun Street*; the company were also empowered to make their railway on an altered level, according to the deposited plans and sections, which shewed that the railway would pass eighteen feet below the level of *Sun Street* instead of above it. By the 8th section, after reciting that the railway was empowered to stop up certain courts and streets, and that it was desirable to preserve for the use of the public a through communication between *Sun Street* and *Liverpool Street*, it was enacted that the company should cover over a portion of the station sufficient to admit of a passage eight feet wide from *Sun Street* to a point in *Liverpool Street*. And by sect. 38 it was enacted that, except where it was thereby otherwise expressly provided, nothing therein contained should repeal or alter the provisions of the Act of 1864, contained in the 8th and the following sections, so far as such provisions could be carried into effect consistently with the provisions of the Act of 1870.

The railway company insisted that under these Acts they had power to stop up *Sun Street*, and the Commissioners of Sewers of the City of *London* filed the information and bill in this suit to restrain the company from so doing, and moved accordingly.

On behalf of the relators, evidence was produced that *Sun Street* was an important thoroughfare which could not be stopped up without producing great inconvenience; that no evidence was given before Parliament as to the stopping up of *Sun Street*, though it was not usual for Parliament to allow important thoroughfares to be stopped up without good reasons; that the agents of the commissioners were, until 1871, quite ignorant of any intention to stop up *Sun Street*, as the deposited plans shewed no such intention, otherwise the commissioners would have opposed in Parliament the granting of power to stop up *Sun Street*. The relators also produced a plan by which *Sun Street* could be carried through the station at a sufficient height above the rails.

It appeared that the commissioners and others had, in 1864, petitioned against the bill, and the Defendants stated that the alteration in the station area was made on account of the opposi-

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tion of the Board of Works, and that certain other streets were to be widened by the company, which their solicitor considered to have been intended as a compensation for closing *Sun Street.*

The Vice-Chancellor *Bacon* granted an injunction (1), and the Defendants moved by way of appeal to discharge the injunction.

W N (1872) 4.

(1) 1872. Jan. 12. SIR JAMES BACON, V.C., said that he thought the Act of 1864 reasonably clear, and that he was bound under the 6th section to look at the whole of the deposited plans, on which there could be no doubt as to what the railway company then proposed. They proposed to make a railway and station, and they deposited a plan shewing amongst other things very plainly the actual surface level of the land with which they were dealing, and the level of the railway which they proposed to make, and that they proposed to shut up *Half Moon Street* but not *Sun Street.*

Then what part of that description was to be rejected? This was not like the case of *North British Railway Company* v. *Tod* (12 Cl. & F. 722), or a case where the Court would have to introduce any new thing, or to read something which had not been a part of the representation upon which the application was made to Parliament, or which Parliament did not sanction. The 6th section was in the plainest possible terms, and referred to the plans and sections as shewing the lines and levels of the railways and of the station.

It had been said that if the 8th section was to be referred to, and that argument should prevail, then there would be a direct inconsistency. So there would; but it would be an inconsistency so gross and violent that nobody having to construe the Act of Parliament would hesitate in saying that the words contained in the 8th section might have the full sense given to them which the Legislature intended, and yet the 6th section remain untouched, the obligation upon the company being exactly the same, neither more nor less than it would be if the 8th section had not been included.

But the preamble had been referred to, and quite rightly, because it was of very considerable importance. His Honour then read the preamble, and said that it did not appear from the Act of Parliament that there was any intention to stop up any streets or anything else for the purpose merely of the railway, but the station was distinctly described, and was, according to the original design, to have been made between *Sun Street* and *Liverpool Street,* and there was no notion then of making the station anywhere else. The intention of Parliament as to the streets and highways which were to be stopped up was perfectly clear, and only applied to the station.

The 7th section was also of importance as it directed the company in the first instance to commence with that part of the works which was between *Liverpool Street* and *Sun Street,* and there was no suggestion of any authority to touch *Sun Street.*

Now, was it possible to doubt—having the plans and the levels and sections there described, and reading the words of this Act of Parliament—that the plain intention of the Legislature was that the company should make the railway as they then desired to make it, that in passing *Sun Street* the level should not be altered, but the crossing should be made by means of the arch there described? If that were to be done, for what purpose could the company desire to stop up *Sun Street,* The appeal motion came on for hearing on the 16th of February, when their Lordships suggested that the motion for an injunction should be turned into a motion for a decree, which was accordingly done, and in that form came on for hearing on the 22nd of April.

The *Solicitor-General* (Sir *G. Jessel*) and Mr. *Amphlett*, Q.C. (Mr. *Pontifex* with them), for the relators:—

If the company say they have a right to stop up the street, they must make it clear on the Act, which is their own Act. They have no right to frame an Act so as to deceive the public and the Parliamentary Committee. Mere general words are not sufficient for a thing like this, and the company must prove that the legislature intended them to do that which did not appear on the plans. We

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which was admitted to be a great thoroughfare? There was no provision for it in the Act of Parliament, nor could it be supposed that the Legislature intended that a street of such importance should be positively abolished for no purpose consistent with the design mentioned in the Act.

The railway company afterwards changed their designs. Instead of making the railway as they had intended to do by carrying it over *Sun Street* they wished to make it by carrying it below *Sun Street*. For that purpose there was no reason why *Sun Street* should be stopped, and there was nothing to prevent them building their station below *Sun Street* without disturbing the level of *Sun Street*; and no object which the undertakers proposed to themselves, and no authority which the Act of Parliament intended to confer, could interfere in the slightest degree with that which was the plain meaning of the statute.

The authorities shewed that the Court construes these Acts of Parliament strictly against railway companies—not severely or by straining the Acts—but when powers have been granted very much in the nature of a monopoly the limits of these powers must not be in any degree extended or transgressed. The case of *Attorney-General* v. *Leeds Corporation* (Law Rep. 5 Ch. 583) was important as shewing the manner in which the Court would deal with the words in an Act of Parliament, which, taken in a certain bald and literal sense, might have authorized the committing of a nuisance; and the Court in that case without much difficulty got through the cobweb objections that were there raised.

His Honour thought that if there had been shewn any intention to stop up a street of great traffic like *Sun Street*, opposition would have been raised, and much greater attention would have been paid to the matter than seemed to have been bestowed upon it.

Without the slightest doubt in the mind of His Honour as to the true construction of the Act of Parliament, he held that the relators were entitled to the injunction which they asked; and if he had entertained any doubt he should not allow the railway to commence their destructive operations until the hearing.

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say that the Act of 1864 gave no such powers, and that none were granted by the Act of 1870. The plans are distinctly referred to by the Act, and may be looked at: *North British Railway Company* v. *Tod* (1). Moreover, the special Act incorporates the general Act, which provides for depositing the plans, and they became, therefore, part of the Act.

The difficulties which have been raised in several cases where a company, when formed, has been held not to be bound by what the promoters had done, do not arise here, for the company here was an existing corporation when they applied for the Act. If the sections in the Act are inconsistent, the company ought not to have the benefit. *Sun Street* was always treated as if it was to remain, and a passage was ordered to be made which would be useless if *Sun Street* was to stopped up. The deposited plans must be accurate: *Ware* v. *Regent's Canal Company* (2); and the company are bound to get clear powers: *Lamb* v. *North London Railway Company* (3); *Attorney-General* v. *Tewkesbury and Malvern Railway Company* (4).

Mr. *Kay*, Q.C., and Mr. *Smart*, for the company:—

The plans and sections are not part of the Act: *North British Railway Company* v. *Tod; Beardmer* v. *London and North-Western Railway Company* (5); *Reg.* v. *Wycombe Railway Company* (6). The land which we can take must be ascertained from the Act, and not from the deposited plans; and the Act is clear in giving us power to stop up all the streets in a defined area, which includes *Sun Street.* There is nothing to qualify the general words in the Act. We could, under the Act of 1864, have stopped up *Sun Street,* and now we have besides the Act of 1870. We say that unless *Sun Street* is stopped up we cannot make our station, which we are empowered to make. As to the plans and sections, they do not shew what streets are to be stopped up, but only shew the line of railway and the levels.

Mr. *Amphlett*, Q.C., in reply:—

It is absurd to say that a street is to be stopped when the plan

(1) 12 Cl. & F. 722.
(2) 3 D. & J. 212, 223. 5 Jur. N.S. 25.
(3) Law Rep. 4 Ch. 522.
(4) 1 D. J. & S. 423. 9 Jur. N.S. 9
(5) 1 Mac. & G. 112.
(6) Law Rep. 2 Q. B. 310.

shews the arch by which it is to be crossed; and, besides, the plans do shew that other streets are to be stopped. If there is any doubt about it, the great inconvenience of stopping up the street ought to prevail.

SIR G. MELLISH, L.J.:—

This is an information, in the name of the Attorney-General, brought by the Commissioners of Sewers of the City of *London*, on which the sole question to be determined is, whether, according to the true construction of the Acts of Parliament which the *Great Eastern Railway Company* have obtained for the purpose of making their station, they have acquired power to stop up *Sun Street*. The *Railways Clauses Consolidation Act* gives no power to stop up streets, and, therefore, they clearly cannot have power to stop up *Sun Street*, unless we find that an express power is given by their special Act. But certainly the Act of 1864, if we look at that alone, without considering the deposited plans and the *Railways Clauses Consolidation Act*, appears to me to confer this power upon the company in the plainest possible terms. [His Lordship then stated the principal sections in the Act.] Looking to the recitals and the 8th section, it is difficult to say how plainer words could have been used for the purpose of shewing that the company were to be entitled to stop up this street, and to appropriate the site of the street for the purposes of the station. It is true that the streets in that area are not enumerated; but if it were intended that the company should be allowed to stop up all the streets within the area, it would be wholly useless and unnecessary, and might possibly have led to difficulty, if they had professed to set them all out by name, because if they happened to leave one out the consequence would be that they could not stop up that street. That is simply how the case stands under that Act.

Now let us see what there is on the other side. It appears that in the deposited plans the company did specify what streets were intended to be stopped up, and what streets were not intended to be stopped up, and that the level of *Sun Street* would be unaltered. Therefore no doubt there was a representation made that some streets were to be stopped, and that *Sun Street* was not to be stopped. Then, besides that, it was shewn on the plans that there was to be an arch across the street, and the dimensions of the arch were given.

A railway company is obliged by the Standing Orders to deposit certain plans shewing what they propose to do; but it has been settled law since the case of *North British Railway Company* v. *Tod* (1) that a company is not bound by the mere fact of a representation having been made on a plan deposited by them, unless the representation is incorporated in the Act. And this is the law, although the fact of such representation having been made may have had the effect of preventing the persons interested in the matter from opposing the railway company in Parliament.

The question, then, is how far the representation that *Sun Street* would not be stopped, and that it would be crossed by an arch of a certain height, is incorporated in the Act of Parliament?

Now, in the special Act the only section which was referred to as having reference to the plans and sections was the 6th. [His Lordship read the section.] That does not appear to me sufficient to incorporate the statement that *Sun Street* was not to be stopped or was to pass on an arch, as it merely points out the line in which the railway is to be made, the limits of deviation, and the levels of the railway.

But reliance was placed upon the 13th and 14th sections of the *Railways Clauses Consolidation Act* (8 Vict. c. 20), which is incorporated with the special Act; and it was argued by Mr. *Amphlett* that the limitation in the first section of the *Consolidation Act*, namely, that the clauses and provisions of that Act shall apply save so far as they shall be expressly varied or excepted by the special Act, ought not to be construed as applying to the present case.

But I am not of that opinion. It appears to me very improbable that Parliament should have intended to incorporate the general provisions of the *Railway Clauses Consolidation Act* without making them subject to that limitation. For if we find something expressly different in the Acts, that which is in the special Act must overrule that which is in the general Act. And this, as far as I know, is the universal rule.

Now, the 13th section is not amongst the sections which relate to crossing of roads by railways, but is amongst those which simply relate to the construction of the railway and of the works connected therewith. It enacts that, "Where in any place it is intended to carry the railway on an arch or arches or other viaduct as marked on the said plan or section, the same shall be made accordingly." I agree that that does so far incorporate the plans and sections, unless there is something to the contrary in the special Act, unless, for instance, the special Act prescribes that the railway (which I think means in this case the line of railway, and does not refer to the station,) shall cross *Sun Street* by an arch, and in no other way.

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(1) 12 Cl. & F. 722.

Then the 14th section says, that it shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, with certain exceptions, which I think are not applicable to this case. It may be assumed that this arch would be an engineering work within the meaning of that section; and this, then, amounts to a repetition merely of what was contained in the 13th section.

Now, what appears to me to be the real question to be decided in this case is this, Does the recital in the special Act, together with the 8th section, amount to an express varying of the enactment in the general Act, which says that the arch is to be constructed as delineated on the plan and section? I am very clearly of opinion that it does. If *Sun Street* had been mentioned by name, and if in the 8th section of the special Act they had taken the trouble to enumerate all the streets which were within the area, and *Sun Street* had been one of those enumerated, it could hardly have been contended, and, as I understand the argument, it is not contended, that that would not have overruled the provisions in the *Railways Clauses Consolidation Act*. And I cannot see that it makes any difference that the special Act does not enumerate the streets, but merely says that the company may stop up all the streets within the area, and may appropriate the site of the streets (which makes the matter still stronger) for the purposes of the station. It appears to me that that does expressly vary the provisions of the 13th and 14th sections of the *Railway Clauses Consolidation Act*, and does enable the company to stop up *Sun Street* and appropriate the site of the street for a station.

The 7th section was also referred to; but it really appears to me to have little or no bearing on the question. It simply provides for the benefit of the landowners that the company are to construct one portion of the line before the other.

Therefore, I am of opinion, that upon the proper construction of the first Act, the company have power to stop up *Sun Street*, and to appropriate the site for their station.

Then it can hardly be contended, and indeed I do not think it was seriously contended, that if that is the true construction of the first Act, the right to stop up *Sun Street* is not continued by the second Act. In fact, the 38th section does expressly and in terms preserve the 8th section of the first Act. But the Act of 1870 entirely did away with the arch, and altered the level by which the railway was to cross *Sun Street*, so that if *Sun Street* was not to be blocked up it was to be crossed above instead of below. Then that alteration having been made, we are to read the 8th section of the old Act as incorporated in the Act of 1870. And it appears to me that the true construction of the first Act being that they may stop up the street, that view is really confirmed by the second Act.

Upon the whole, therefore, I am of opinion that the company have power to stop up *Sun Street*, and have power to appropriate the site; provided, of course, that they make their station there, because they would not have the power if they did not make their station there, but only took their line of railway under it.

The consequence is that the information must be dismissed with costs, except of course the costs of the appeal.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. I wish that we had power to compel the company to abide by what they represented on their plans; but it appears to me, for the reasons which have been stated by the Lord Justice, that it is impossible to limit these plain words of the Act of Parliament by that which appears to have been upon the plans, as the plans were solely for the purpose of indicating how at that particular date they intended that the line should be constructed.

Solicitor for the Relators: Mr. *A. J. Baylis.*
Solicitor for the Company: Mr. *W. H. Shaw.*

In re INTERNATIONAL CONTRACT COMPANY.

L. JJ.
1872
March 1.

42 L.J. Ch.
[illegible] 457

IND'S CASE.

Company—Winding-up—Rectification of Register—Transfer of Shares—Error in distinguishing Numbers of Shares.

In a transfer of shares in a joint stock company an error in the distinguishing numbers of the shares is immaterial, provided the transferor has at the time a sufficient number of shares in the company.

Fifty shares were transferred by the chairman of a company to *A.*, as a trustee for the company numbered as therein stated, and *A.'s* name was placed on the register in respect of those shares. The transferor had at the time no shares bearing those numbers, but he had fifty shares bearing other numbers:—

Held (affirming the decision of *Wickens*, V.C.), that *A.* must be on the list of contributories for fifty shares.

THIS was an appeal from a decision of Vice-Chancellor *Wickens*, made in the winding-up of the *International Contract Company, Limited.*

Robert Laundy Ind was a clerk in the office of the company, and in April, 1866, several shares were transferred into the names of the clerks and servants of the company, as nominees or trustees for the company.

On the 10th of April, 1866, a transfer was executed by *G. P. Kitson*, the chairman of the company, of fifty shares, numbered from 11,105 to 11,154, to *R. L. Ind*, and his name was entered on the register as the holder of those shares. At the time when *Ind* executed this transfer the words "fifty shares" and the distinguishing numbers had not been inserted. *Ind* at the same time executed a blank transfer of fifty shares, which was placed in the hands of the company that they might transfer the shares to whomsoever they pleased.

It was afterwards discovered that the shares numbered from 11,105 to 11,154 did not belong to Mr. *Kitson*, but had been allotted to some other person. Mr. *Kitson* had, however, other shares, and amongst them were some numbered from 11,005 to 11,054, and in the blank transfer which *Ind* placed in the hands of the company these numbers were afterwards inserted.

The company was subsequently wound up under an order of the Court, and on the 26th of June, 1869, *Ind's* name was settled by

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Ind's Case.

the Chief Clerk on the list of contributories. The certificate was filed on the 19th of March, 1870. *Ind*, who had previously taken no steps to get his name removed from the list of contributories, on the 25th of June, 1871, applied to Vice-Chancellor *Wickens* in Chambers to rectify the register of shareholders by removing his name. The Vice-Chancellor refused the application, and adhered to that opinion when the application was renewed in Court on the 5th of December, 1871(a)/*Ind* now appealed from this decision.

Mr. *De Gex*, Q.C., and Mr. *Horton Smith*, for the Appellant, contended that the transfer to *Ind* was void, for the transferor had no such shares at the time of the execution of the transfer: *Saunders's Case* (1).

Mr. *Hardy*, Q.C., and Mr. *Higgins*, Q.C., for the official liquidator, contended that the distinguishing numbers of the shares were not material; the substance of the transaction being the transfer of fifty shares. To this *Ind* had consented, and he had allowed his name to remain on the books ever since as the proprietor of fifty shares.

Sir W. M. James, L.J.:—

A creditor is not supposed to look minutely at the list of shareholders to see whether each shareholder is rightly entered on the register or not. He has nothing to do with tracing the title to the shares. If the creditors find a man on the list for fifty shares they do not look at the particular numbers; all that concerns them is that he is on the list of shareholders for fifty shares. In this case Mr. *Ind* executed a deed by which he undertook to accept fifty shares; he knowingly held himself out to the world as the owner of those fifty shares, and he took on himself all the powers and liabilities of a shareholder. No doubt he was a nominee and trustee for the company, but being on the register for those fifty shares at the time of the winding-up, he was fixed there, and left to get such indemnity as he might be able to get from the company, who had induced him to take shares. I cannot think that he should be allowed to say that there was some mistake about the figures in the transfer—a mistake which was very easily made, for it appears that the numbers ought to be from 11,005 to 11,054 instead of from 11,105 to 11,154. The substance of the transaction was that he meant to be on the list for fifty shares; he was on the list for fifty shares, and the creditors and other persons interested have a right to hold him to that.

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(1) 2 D. J. & S. 101. 10 Jur. N.S. 246

(a) See W.N. (1871) 237.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think the numbers of the shares are simply directory for the purposes of enabling the title of particular persons to be traced; but that one share, an incorporal right to a certain portion of the profits of the company, is the same as another, and that share No. 1 is not distinguishable from share No. 2, in the same way as a grey horse is distinguishable from a black horse. If, therefore, a holder of shares has the same number of shares which he professes to transfer, or a larger number, and by mistake the wrong distinguishing numbers are put in the transfer, that will not prevent the fifty shares which belonged to him passing to the transferee. The figures might afterwards be rectified. I think the substance of the matter is that Mr. *Ind* has agreed to take fifty shares as between him and the creditors of the company; he has been registered with his own consent as to these shares, and therefore he is properly on the list. The appeal must be dismissed with costs.

Solicitors: Messrs. *Tilleard, Godden, & Holme;* Messrs. *Lewis, Munns, & Longden.*

L. JJ.
1872
March 14.

Ex parte HEYMANN. *In re* HEYMANN.

Committal—Affidavit without Jurat.

A warrant for the committal of a bankrupt was expressed to be made on the reading of the affidavits therein referred to. The Commissioner before whom one of these affidavits was sworn had omitted to sign the jurat:—

Held, that the warrant must be discharged, and that the Court could not enter into the question whether there was enough in the other affidavits to support it, and that the defect could not be cured by the Commissioner signing the jurat in Court on the hearing of the application to discharge the warrant.

THIS was a motion by the bankrupt to discharge two orders of Mr. Registrar *Hazlitt*, dated the 5th and 9th of March, 1872. The question was whether the bankrupt should be detained in custody under a warrant issued on the 2nd of March for committing him to prison.

The warrant recited as follows: "Whereas, by the affidavits of . . . . . filed the 21st day of February, 1872, and the affidavits of *J. R. Robinson* and *J. Farley*, filed this day, it hath been made to appear to the satisfaction of the Court that the said *M. Heymann* has concealed, or is about to conceal or destroy, his books, documents, or writings, or some or one of them, which books, documents, or writings, or some or one of them, may be of use to the creditors in the course of the bankruptcy of the said *M. Heymann*, these are, therefore, to require you," &c.

The Commissioner before whom the affidavit of *Robinson* was sworn had omitted to sign the jurat, and the affidavit had been filed with this defect. The point had been called to the attention of the Registrar, but he stated his opinion to the effect that without this affidavit the evidence was sufficient.

Mr. *De Gex*, Q.C. (Mr. *Robertson Griffiths* with him), having mentioned the absence of the jurat in the opening of the case,

THE COURT called upon the counsel for the Respondent.

Mr. *Winslow*, and Mr. *Warmington*, *contrà*:—

The Commissioner before whom the affidavit was sworn is in Court, and ready to sign the jurat now.

L. JJ.
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Ex parte HEYMANN.
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[The LORD JUSTICE JAMES:—That is not sufficient. When the warrant for committal was issued this was not an affidavit on which an indictment for perjury would lie, and the warrant cannot be supported by supplying the defect now.]

There is sufficient evidence, apart from this affidavit, to justify the warrant, and the Registrar stated that he did not consider the affidavit material, as it only stated facts which were deposed to by other witnesses.

SIR W. M. JAMES, L.J.:—

We cannot travel out of the warrant, and enter into the question whether it would have been issued if a part of the evidence on which it is expressed to be founded had not been there. If an order of committal in Chancery were expressed to be made upon evidence consisting, in part, of an affidavit not authenticated in such a way as to entitle the Court to look at it, the order would be bad. The warrant must be discharged, without prejudice, of course, to any application for a fresh warrant.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The case is just the same as if the warrant were expressed to be made on a set of affidavits, and a written statement by *Robinson,* not made upon oath. Such a warrant would be clearly bad.

Solicitors: Mr. *Henry Sydney;* Mr. *Ditton.*

L. JJ.
1872
April 18.

Ex parte WILSON. *In re* DOUGLAS.

Bankruptcy—Double Proof—Estate administered in two Countries—Bankruptcy Act, 1861, *s.* 152.

11 Ch D 318-9, 320, 321
5 App Cas 161-4, 165-8, 173-6

D., who carried on business in *England* under the firm of *D. & Co.*, and in *Brazil* under the firm of *D., L., & Co.*, executed a deed of assignment of all his property for the benefit of his creditors, which was registered under the *Bankruptcy Act*, 1861. His Brazilian assets were administered under a *concordata*—a proceeding analagous to bankruptcy—under which by the law of *Brazil* the creditors whose debts were contracted in the name of the Brazilian firm had priority. The holders of certain bills of exchange drawn by *D., L., & Co.* upon, and accepted by, *D. & Co.*, proved in *Brazil*, and received a dividend. They then claimed to prove in *England*, and the proof was admitted without qualification by the County Court Judge:—

Held, on appeal, that sect. 152 of the *Bankruptcy Act*, 1861, did not apply, as there were not two estates being administered in bankruptcy, but one estate, which was administered partly in *Brazil* and partly in *England*; and that the billholders could not receive a dividend in *England* until all the creditors had received a dividend at the same rate as the Brazilian dividend.

THIS was an appeal by the trustees of a creditors' deed executed by *William Douglas* from a decision of the County Court Judge of *Liverpool* allowing a proof.

William Douglas was in reality a sole trader, but carried on business at *Liverpool* under the firm of *Douglas & Co.*, and at *Bahia* under the firm of *Douglas, Latham, & Co.* The proof in question was on bills of exchange drawn in 1869 by *Douglas, Latham, & Co.* upon and accepted by *Douglas & Co.* On the 14th of December, 1869, *Douglas*, who was resident in *England*, executed a deed assigning all his estate to trustees for the benefit of his creditors; and this deed was duly registered under the *Bankruptcy Act*, 1861. The English assets were got in by the trustees, but the Brazilian assets were administered under a *concordata* in *Brazil*. It appeared that, according to Brazilian law, the firm of *Douglas, Latham, & Co.* was treated as a distinct body, so that the persons who would have been joint creditors of that firm, supposing it to consist of different persons from the English one, were treated as having the first claim to the assets administered in *Brazil*. The billholders went in under the *concordata*,

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In re DOUGLAS.

and received a dividend, after which they sought to prove under the deed of assignment in *England*, and the County Court Judge admitted their claim. The trustees appealed.

Mr. *Swanston*, Q.C., and Mr. *Bagley*, for the Appellants :—

This is not a case within the *Bankruptcy Act*, 1861, s. 152. *Douglas* was a sole trader; there was only one estate to be administered; every creditor, whether Brazilian or English, has the same right to prove here; and the fact that Brazilian law lays hold of the assets in *Brazil* for the benefit of the Brazilian creditors does not alter the case. There can be no proof in *England* without allowing for what has been received in *Brazil*: *Selkrig* v. *Davis* (1); *Goldsmid* v. *Cazenove* (2).

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Respondents :—

This case is governed by sect. 152, which was passed for the purpose of meeting the case of *Goldsmid* v. *Cazenove*. The words "in the whole" are unintelligible unless treated as intended to provide for a case like this. If two firms in *England* were composed of the same persons no question of double proof could arise, for there would be only a single administration of a single estate. The clause must have intended by the words "in the whole" to provide for the case of two firms, one abroad and one here, consisting of the same members, as in that case there would be two estates administered. There is nothing unreasonable in double proof in such a case; it is as if there were two limited companies in which the shareholders were the same.

Mr. *Swanston*, in reply.

SIR W. M. JAMES, L.J. :—

In this case, although I dissent from the conclusion arrived at by the learned Judge of the County Court, I entirely concur with the greater part of his judgment. He seems to have expressed his opinion very clearly that the 152nd section of the Act of 1861 had nothing to do with the case. He points out distinctly that this is not a case of two or more firms, it is the case of one indi-

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(1) 2 Rose, 291.

(2) 7 H. L. C. 785. 5 Jur NS. 1186

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vidual having business in two places, and having assets in two places connected with the two businesses; and he has come to the conclusion, in which I agree with him, that you cannot in such a case say that there are two distinct estates to be wound up in bankruptcy. The estate is in my judgment one estate, the estate of the individual who carries on business in both places, and that estate will have to be administered according to the English law so far as it comes into this country, and the English law would lay hold of any assets connected with the *Brazil* business that came within its reach, just in the same way as it would lay hold of the assets in this country connected with the *Liverpool* business. That is to say, there is only one estate as against which all creditors, not merely the trade creditors, but the butcher, the baker, the tailor, the wine merchant—all the creditors of the man in his own domestic character—stand on exactly the same footing, and each creditor, whether a trade creditor or a creditor of the debtor in his private character, would be entitled to share in the assets of both firms. Therefore I quite agree with the learned Judge that there are not here two distinct estates to be wound up in bankruptcy. If there are not, then the section does not apply, and we cannot extend the section so as to make it apply to a case in which there are not two distinct estates, merely because there is some difficulty or ambiguity in a subsequent part of it. It is difficult to say exactly what is meant by the words "in whole or in part composed of the same individuals;" but the difficulty in construing those words is no reason for saying that the section is to apply to a case in which there are not two distinct estates. Here in my judgment there is only one estate. The Brazilian law lays hold of those assets which are within the reach of the Brazilian Courts, and in administering them gives a preference to particular creditors; but that is only the same kind of thing as if an execution creditor was by the law of *Brazil* allowed to retain, as against the general creditors in bankruptcy, the goods he seized in execution. Then if the section does not apply, as I quite agree with the learned Judge of the County Court it does not, it seems to me that he would not have decided as he has done if his attention had been called to the decision of the House of Lords in *Selkrig* v. *Davis* (1), from which it is clear that, if a particular creditor who is able to lay hold of assets of the bankrupt abroad comes here to share with the other creditors, he must bring into the estate here that which the law of the foreign country has given him over the other creditors. I am of opinion that the order ought to be varied by allowing the Respondents to prove, but not to receive dividends until the English creditors have received equal dividends with them.

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(1) 2 Rose, 291.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Independently of the 152nd section of the Act of 1861 it is admitted, and it certainly could not be denied, that the Respondents, having obtained in *Brazil* a portion of the assets, which, by the law of *England*, are distributable equally among all the creditors, cannot prove against the estate in *England* so as to get part of the assets which are being distributed in *England* without abandoning that part of the assets which they have received. The question, therefore, entirely turns upon this 152nd section, and after very carefully considering it, and the able arguments which have been addressed to us, I am of opinion that it is impossible to make that section apply to any case where there are not distinct estates to be administered in bankruptcy. I agree that in order to make the section apply it is not necessary that there should be distinct estates to be administered by the Court of Bankruptcy in *England*, but that it would apply if there was one estate being administered abroad by a Court which was practically a Court of Bankruptcy, and other estate being administered by the Court of Bankruptcy here; but there being here only one debtor, the argument comes to this: that because the Court of *Brazil*, in administering the assets which are locally situate in *Brazil*, gives a preference (I cannot think there is any evidence to shew that it amounts to more than giving a preference) to the Brazilian creditors, that is to say, to creditors whose debts have been contracted in the name of the Brazilian firm; therefore there are separate estates. There is no evidence, and I cannot assume, without evidence, that the creditors of the English firm, although they would be postponed in *Brazil* by the law of *Brazil* to the creditors of the Brazilian firm, would not, if the assets in *Brazil* were sufficient to pay those creditors in full, be entitled to be paid out of

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the surplus of those assets; nor can I assume that creditors of the bankrupt, the debts due to whom had been contracted by him individually, not in the course of his trade nor in the name of either firm, would not, by the law of *Brazil*, have a claim against the surplus assets after the Brazilian creditors were paid. It is, therefore, not a case where there are distinct estates, one being administered by the law of *Brazil* and another being administered by the law of *England*, but it is a case in which the same estate is being distributed, partly in *Brazil* and partly in *England*, but where the Brazilian law says that a certain class of creditors are to have a preference, and where the law of *England* says that all creditors are to take equally. That being the case, I am of opinion there is nothing to prevent the application of the common rule that if a creditor comes to take the benefit of the English law and proves against the English estate, he cannot take advantage of the preference that he has received under the law of a foreign state.

MINUTES:—Discharge the order of the County Court Judge. Admit the Claimants to prove, but with the condition that they shall not receive any dividend until after the other creditors have received a dividend equal to the dividend received by the Claimants under the proceedings in *Brazil*.

Solicitors: Messrs. *Le Riche & Son*, for *Cobbett, Wheeler, & Cobbett, Manchester;* Messrs. *Sale, Shipman, & Seddon, Manchester.*

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April 18.

Ex parte LYONS. *In re* LYONS.

Bankruptcy—Composition—Jurisdiction—Setting aside Deed—Bankruptcy Act, 1869, *s.* 72.

8 Ch 559,
9 CP 674
10 Ch 311
2 Ch D 432
1 Ch. D. 149.
4 Ch. D. 469

On the 5th of May, 1871, *L.* filed a petition for liquidation by arrangement. On the 9th of May, *B.* was appointed receiver, and took possession of the debtor's goods. On the 9th of June, the creditors passed resolutions appointing *B.* trustee, and accepting a composition for which promissory notes were to be given and handed to *B.* for distribution among the creditors. On the 27th of July, *B.* having a lien on the goods for his costs, *L.* gave him a memorandum by which, in consideration of *B.*'s satisfying a distress for rent, and giving time for payment of the costs, he agreed to give *B.* a charge on the goods for the costs, and to execute any deed required for giving effect to that charge. *B.* delivered his bill of costs, and in August *L.* gave him a bill of sale of the goods for the amount, upon which the goods were delivered to *L.* *L.* afterwards applied to the Court of Bankruptcy for taxation of *B.'s* charges and an account of the moneys received by him, and to have the bill of sale set aside as obtained by pressure:—

Held (affirming the decision of the Registrar), that the Court of Bankruptcy had no jurisdiction to set aside the bill of sale, and that, therefore, no relief could be given on the application.

Semble, that there would have been jurisdiction to settle the amount of *B.'s* charges if it had not been settled between the parties, that being a matter incident to the composition.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice* sitting for the Chief Judge.

On the 5th of May, 1871, *Lyons* filed a petition for liquidation by arrangement. On or about the 9th of May the Respondent *Brett*, an accountant, accepted the appointment of receiver, and proceeded to take possession of the debtor's property. On the 26th of May a meeting of creditors was held, at which a statement of affairs which had been prepared by the receiver was produced. The meeting was adjourned till the 9th of June for the production of a balance sheet which the receiver was directed to prepare. The balance sheet was accordingly prepared and produced to the creditors, who, at the adjourned meeting, passed resolutions by which they agreed to accept a composition of 7*s.* 6*d.* in the pound, payable by three instalments at four, eight, and twelve months, for which promissory notes were to be given and handed to *Brett* for distribution among the creditors. At this meeting *Brett* was elected trustee. On the 21st of June a second meeting was held, at which the resolutions were confirmed, and on the 26th the resolutions were registered. Pending these proceedings, the landlord of the premises which *Lyons* occupied was in possession of his goods under a distress for rent, and the moneys which *Brett* had received were little more than sufficient to pay the landlord, leaving his own costs, which were considerable, unprovided for.

On the 27th of July *Lyons* gave to *Brett* a memorandum, which was in part as follows: "In consideration of your paying out the distraint for rent, amounting to £104, and allowing me a delay of one month to satisfy your costs, I hereby give you an absolute lien upon the whole of the stock, book debts, and other assets in my possession or belonging to my estate, for the whole of such pay-

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ment, costs, and expenses as have been or may be incurred by you." *Lyons* also by this memorandum bound himself to execute any deed which might be required for giving more full effect thereto.

Brett accordingly paid the landlord, and took possession of the goods both as trustee and by virtue of the security created by the memorandum. Some disputes shortly afterwards arose as to an alleged fraudulent removal of part of the goods by *Lyons*, and negotiations took place as to the terms on which *Lyons* should be allowed to resume possession of his goods so as to carry on his trade. Ultimately, about the end of August, 1871, *Lyons* executed to *Brett* a bill of sale for securing to *Brett* the sum of £349 1*s.* 1*d.*, being the balance due to him for his costs, charges, and expenses as receiver, trustee, and accountant, according to an account previously rendered by him to *Lyons*, and the instrument contained a covenant by *Lyons* for payment of that sum. Thereupon the notes for the composition were delivered out to the creditors, and *Lyons* was let into possession of the goods.

Lyons subsequently paid to *Brett* a considerable part of the £349 1*s.* 1*d.*, but on the 8th of March, 1872, gave notice of motion for an order that *Brett* should bring in his bill of charges for taxation, and deliver to *Lyons* all property of his in *Brett's* hands, and deliver to him a debtor and creditor account of all moneys received by *Brett*, and that it might be referred to the Taxing Master to ascertain what, if anything, was due from *Brett* to *Lyons*, and that *Brett* might be ordered to pay to *Lyons* any sum that might be so found due, and that the bill of sale might be delivered up to be cancelled, and that *Brett* might be ordered to pay the costs of the application.

This application was supported by affidavits, the general effect of which was that *Brett's* charges were excessive, and that the letter of the 27th of July and the bill of sale had been obtained by pressure, *Brett* taking advantage of his having the goods and the promissory notes in his hands.

The application was heard by Mr. Registrar *Spring Rice* sitting for the Chief Judge, and was dismissed by him with costs on the ground that as soon as the resolutions for composition were passed all parties were remitted to those sections of the *Bankruptcy Act*, 1869, which were applicable to compositions, and that those sections

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did not give the Court jurisdiction to order taxation nor to grant any other part of the relief asked, such relief having no connection with the carrying the resolutions of the creditors into effect.

Mr. *Swanston*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

The objection has been taken in the nature of a preliminary objection, that the Court has no jurisdiction. We contend that the Court has jurisdiction, the Respondent having obtained possession of the goods as an officer of the Court, and having taken advantage of his position. The matter is a matter of bankruptcy; the proceedings being such that the debtor might have been adjudged bankrupt in them.

[They referred to the *Bankruptcy Act*, 1869, ss. 65, 72, 126; Bankruptcy Rules, 1871, 4, 5; *Ex parte Anderson* (1); *Ex parte Rumboll* (2).]

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, *contrà*, were not called upon.

SIR W. M. JAMES, L.J.:—

The learned Registrar, acting for the Chief Judge, has decided that the Court has no jurisdiction to grant the relief sought, and I am of the same opinion. The substance of the application is to set aside a deed executed by the debtor after resolutions accepting a composition had been come to. This is the whole substance of the case, for so long as that deed stands it is clear that the Appellant cannot be entitled to anything else that he asks. The reason alleged for impeaching this deed is that it was obtained by Mr. *Brett* oppressively, and by taking advantage of the position in which he stood in connection with the proceedings that led to the composition. The world has already been startled at the extent of the jurisdiction assumed by the Court of Bankruptcy under sect. 72, and it behoves us to be careful before we enlarge it, and before we allow every branch of the Court of Bankruptcy to set aside solemn deeds on equitable grounds, merely because they had their inception in, or were somehow connected with bankruptcy

(1) Law Rep. 5 Ch. 473.

(2) Law Rep. 6 Ch. 842.

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proceedings. Here, after the resolutions for composition had been come to, the Appellant and the Respondent met and settled the account of the Respondent's charges, and then this deed was executed. It is said that the account was a fraudulent account, and that the deed was obtained by pressure. This may be so; the deed may be one obtained under circumstances which would induce a Court of Equity to set it aside; but that is a question which it should be left to a Court of Equity to determine. The case does not come within sect. 72, the object of which is to provide a summary remedy in matters relating to the distribution of the estate, or otherwise arising in or really connected with bankruptcy proceedings. I should be sorry to limit the jurisdiction of the Court as to anything which can be said to be a matter incident to the bankruptcy proceedings, and I do not say that the Court might not have jurisdiction to tax the costs if the receiver were holding the property till they were paid. But it does not follow, because there has been a relation between two parties founded on bankruptcy proceedings, that every dealing between them having any connection with that relation is drawn within the jurisdiction of the Court of Bankruptcy. I think the Registrar rightly held that there was no jurisdiction to set aside the bill of sale, and that being so the Appellant's case wholly fails.

1 Ch D. 492

SIR G. MELLISH, L.J.:—

I am of the same opinion. If, on the occasion of the delivery back to the debtor of his goods, after the resolutions for accepting the composition had been carried, a dispute had arisen as to the amount of the Respondent's charges, I should think that the debtor might have applied to the Court of Bankruptcy for an order for the delivery of his goods, and to have the amount of the charges for which the receiver had a lien settled by the Court; for that would be a question arising directly out of the proceedings in that Court. But the debtor, being *sui juris*, settles in a formal way the amount of the charges with the receiver, and gives him a bill of sale to secure the amount so settled, covenanting to pay that amount. Has the Court of Bankruptcy any jurisdiction to set aside that deed? That may be tested by this: Suppose an action at law brought upon the deed, would the Court of Bankruptcy have any

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jurisdiction to restrain it? In my opinion, clearly not; for it would not be a matter relating to bankruptcy. The Court of Chancery would have jurisdiction to restrain the action if a *primâ facie* case were made out that the deed had been improperly obtained, and it could examine into the deed, and, if the case were established, direct an account of what was justly due, and make the bill of sale stand as a security only for what should be found due; but I see nothing in the *Bankruptcy Act* to transfer this jurisdiction to the Court of Bankruptcy.

Solicitors: Mr. *H. Sydney;* Messrs. *Stocken & Jupp.*

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and L. JJ.

1872
May 23.

In re MEYRICKE FUND.

Endowed Schools Commissioners—32 & 33 *Vict. c.* 56, *ss.* 5, 14—*Exhibitions*—*College*—*District.*

The Endowed Schools Commissioners have power to inquire into the endowment of exhibitions at a college in an university, whenever they are restricted to a school or district.

Wales is a district within the meaning of the *Endowed Schools Act.*

Decision of *Wickens*, V.C., affirmed.

THE Rev. *Edmund Meyricke,* by his will, dated the 25th of March, 1712, gave certain estates for the better maintenance of six of the junior scholars of *Jesus College, Oxford,* out of the six counties of *North Wales,* and for the maintenance of six exhibitioners at *Jesus College,* out of the same six counties. The *Meyricke* endowment was administered under decrees of the Court of Chancery, and the number of exhibitioners had been increased to twenty-four. By an ordinance dated the 3rd of April, 1857, under the *Oxford University Government and Extension Act,* it was provided that certain of these exhibitions should be consolidated, and as consolidated should be filled up by the election of deserving persons being natives of *Wales* or *Monmouthshire.*

The Endowed Schools Commissioners, acting under the *Endowed Schools Act,* 32 & 33 Vict. c. 56; and using the powers of the *Charitable Trusts Act,* 1853 (16 & 17 Vict. c. 137, s. 11), and the *Charitable Trusts Act Amendment Act* (18 & 19 Vict. c. 124, ss. 6, 7, 8, 9), called upon the Principal of *Jesus College* to answer certain questions as to the *Meyricke* fund, which, after some correspondence, the college authorities refused to answer. The Commissioners thereupon, in order to try their right, moved to commit the bursar of the college, who was the custodian of the documents; and the Vice-Chancellor *Wickens* held that the Commissioners were entitled to have the information they required; as reported (1), where the facts are more fully stated.

The college appealed.

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(1) Law Rep. 13 Eq. 269.

Mr. *Morgan*, Q.C., and Mr. *Grenside*, for the Appellants:—

The *Endowed Schools Act* was intended to relate to schools merely, not to the universities. The 5th section shews what is to be included, and in it boys and girls are spoken of, shewing what was meant. It was never intended that these Commissioners should have power to interfere with things which had been established for centuries at the universities. It is true that, under sect. 14, college endowments and all endowments not fifty years old are excepted; but on their construction these Commissioners would have power to dictate how most of the university scholarships should be given. If the exhibitions were held in connection with any particular school, the Commissioners might have power, but not when the exhibitions are like these, part of the college. If they can take away these, they can proceed to take away others, and leave the college with nothing. It was argued that these exhibitions were within sect. 14, sub-sect. 4, inasmuch as they were restricted to *Wales*; but it is absurd to call *Wales* a district. Is *Scotland* a district? The word might apply to a county, but not to a country like *Wales*.

The whole subject of the Act is schools and the exhibitions connected with them. When the Commissioners have power over a college exhibition, the Act is clear on the matter, as at sect. 38. The Commissioners may be very proper persons to regulate schools, but not to regulate colleges or universities, for which a body already exists, created by a recent statute, 17 & 18 Vict. c. 81.

Sir *Roundell Palmer*, Q.C., and Mr. *Lindley*, Q.C., for the Commissioners, were not called upon.

LORD HATHERLEY, L.C.:—

The question in this case is, whether a certain endowment under the will of Mr. *Meyricke*, for the support at *Jesus College, Oxford*, of exhibitioners, natives of *Wales*, is within the operation of the *Endowed Schools Act* (32 & 33 Vict. c. 56).

The argument against it was, that this Act was intended to apply solely to funds which were devoted to the education of boys or girls at school. And though the education might, having its commencement at a school, be afterwards continued as to boys or

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young men at college, and, as a consequence, an exhibition at college might come under the Act, yet it was contended that any other exhibitions held at universities were not to be considered as included within the terms and provisions of the Act.

The argument was chiefly on the 5th section; but I confess that there was nothing, as it appears to me, pointed out in the course of the argument, to shew that any such restricted sense is to be applied to the term "educational endowment." Otherwise, why was so large a term adopted? If the Act was simply dealing with certain schools, and persons educated at those schools and pursuing their studies at the universities, why should not an appropriate term have been employed? I am unable to see upon any principle, or upon the original report of the Commissioners on which the Act was founded, or from anything that appears in the Act, that the education there mentioned is an education confined to schools, and not including any education which might afterwards have to be provided for.

It seems to me that the 5th section, on the very face of it, applies plainly and distinctly to the two classes of educational endowment which may be necessary for the completion of a boy's education, whilst, as regards primary education only, it applies both to boys and girls.

With regard to exhibitions at the universities, the Act could not of course have been intended to apply to endowments for the education of girls, because up to the present time there has been no provision made for the education of women at the universities. But that does not prevent the general application of those words. The section speaks, in the first place, of the term "educational endowment" as being applicable to any endowment which has been applied to the education at school of boys and girls, or either of them. Then it goes on to speak of exhibitions tenable at a school, or at an university, or elsewhere. And then it goes on further, and takes the largest view of what an educational endowment may be, by pointing out various purposes which do not seem *primâ facie* to be the immediate purposes of education, but so connected with education as to be within the purport and meaning of the Act.

I apprehend that the first intent of the Legislature in framing this Act, which is a highly remedial Act, was that the Commissioners should have the largest possible powers; and these general words were used lest anything which might have escaped the attention of the Legislature should afterwards be found unprotected by the supervision and care of the Commissioners.

Having given these extensive powers, the Legislature proceeded to make certain exceptions, the intention being obviously that everything not immediately in the contemplation of the Legislature should not escape, and that nothing should escape except things to which the attention of the Legislature was expressly directed.

This is a complete answer to the argument *ab inconvenienti* which has been so much pressed upon us. It was said that surely the Legislature did not intend to confer upon this particular body powers which in several cases appeared too great. But that consideration appears to have occurred to the framers of the Act, because, knowing how large the powers were, they have in certain cases restricted the powers, thus shewing that they are not to be otherwise restricted.

Mr. *Osborne Morgan* objected that the construction which the Vice-Chancellor had given to the Act would lead to the conclusion that many of the university endowments, such as the *Craven* and the *Ireland* scholarships, would be left to the tender mercies of the Commissioners. But when an Act of Parliament has created Commissioners, and entrusted them with duties, I think that every Court is bound to assume that the Legislature considers those Commissioners to be persons fit and proper for the purpose, and that the Commissioners are not to be dealt with as if they were persons likely to abuse or misuse their power.

On this very point, as to the university scholarships, there is great protection afforded by the Act. There is the fifty years clause, which is, I believe, applicable to every university scholarship, except the *Craven* scholarships. There are, besides, other general restrictions on the powers exerciseable by the Commissioners. In the first place, they have not the power of arbitrarily and at their own free will and pleasure effecting all the changes which they may think proper or essential. They are obliged to frame a scheme, and that scheme is to be subject to certain revisions, and there are in certain cases appeals against the scheme to the Queen in Council. Further than that, the scheme has to be laid before Parliament, and either House of Parliament dissenting from the scheme may stop its adoption—a course which, as I am informed, one branch of the Legislature has already adopted with respect to one of the schemes proposed by the Commissioners. All these guards are imposed on those powers, and tend to shew that the construction which gives the widest sense and meaning to the original powers is the correct construction.

There are, besides, several endowments carefully excepted, and these very exceptions tend to shew how large the original powers were meant to be, and how necessary it is therefore not to put a narrow and confined interpretation on the section which describes what educational endowments are to be within the Act.

It was argued that the only exhibitions intended to be under the control of the Commissioners were those connected with schools, but we cannot put that narrow construction on the Act. Suppose that there was a foundation—and we are told that there is actually such a foundation at *Cowbridge*—where there are exhibitions for boys educated at a particular school, and other exhibitions tenable by natives of the town. Can it be supposed that the Commissioners are to have power over one set of exhibitions and not over the other? When the Commissioners are dealing with exhibitions they must consider the boy as having left the school, and must so deal with the exhibitions as to employ them to the best effect for the purposes of education.

I agree entirely with the Vice-Chancellor in not finding any such restriction on the words "educational endowment," and in thinking that the words must be taken in their large and general sense, and that they are intended to apply to exhibitions held by persons who are sent to the university to be educated.

That being the construction which we put upon the 5th section, I will now consider the restrictions imposed by the 4th sub-section of the 14th section of the Act. On this it was argued that *Wales* and *Monmouth* were not a district within the meaning of that sub-section.

Now the founder confined his exhibitions to the six counties of *North Wales*, and it has been hardly argued that those six counties would not be a district within any possible construction of the Act. But subsequently, and before the passing of this Act, by the operation of the powers of the University Commissioners, this restriction was enlarged, and all the counties of *Wales* and *Monmouthshire* were included, as districts from which the persons might come who were to have the benefit of these particular exhibitions, and thereupon it was argued that the exhibitions could not be said to be confined to a district. But no definition of a district as applied to this Act has been suggested to support such an argument. I apprehend that the rule intended to be introduced was, that wherever there is a restriction the Commissioners are to have power, and that whether the restriction is to a school or to a district. Some extravagant cases were hinted at, but they are not likely to occur; and in the not uncommon restrictions of "north of the *Trent*" and "south of the *Trent*," no one could doubt that these are restrictions to a district. So again, if an exhibition was restricted to natives of *Yorkshire*, which is nearly as large as *Wales*, and of which the population is much greater, that would in the same way be a district. Within the meaning of this Act a district means something different from *England* and *Wales*, which forms the whole area with which the Act deals, for it excludes *Ireland* and *Scotland;* and any portion of that area is a district.

An argument may no doubt be founded on the improbability, in the first place—a *primâ facie* improbability—of an Act of this kind dealing with the institutions of the university after the *Oxford University Act*, 17 & 18 Vict. c. 81, had been passed, which established another body, and gave them power to deal with and regulate this particular charity, so that the jurisdiction of these Commissioners does in some degree appear to overlap the jurisdiction which had been conferred upon another body. But that argument fails when we consider the 4th sub-section of the 14th section, which requires in some cases the assent of the college, which would be idle if the power did not exist on which the restraint was placed.

I think that the more every section and sub-section of the Act is considered, the more clearly it will be found that the scheme of the Act is to confer extremely extensive powers, fettered and restricted only in particular cases, and that this Court is not at

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liberty to impose any additional fetters or restrictions. Therefore it appears to me that the conclusion which the Vice-Chancellor has come to is perfectly correct, and that this particular endowment is under the jurisdiction of the Commissioners appointed by the Act.

SIR W. M. JAMES, L.J. :—

I am of the same opinion. I desire to be understood as adopting and repeating every word of the judgment of the Vice-Chancellor, in the Court below.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Commissioners : Messrs. *Farrer, Ouvry, & Co.*
Solicitor for the College: Mr. *F. C. Clarke.*

LIVERPOOL MARINE CREDIT COMPANY *v.* WILSON.

L. JJ.
1872
April 30;
May 7, 27.

1CPD/73.
2CPD/16

Mortgage of Ship—Lien on Freight—Mortgagee in Possession—Priority—Tacking—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 67–70.

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight.

THIS was an appeal from the decision of Mr. *Little*, Q.C., the Vice-Chancellor of the Duchy Court of *Lancaster*.

On the 5th of October, 1868, the Plaintiffs lent Messrs. *Satterfield & Fox*, of *Liverpool*, the owners of the British ship *Donna Maria*, the sum of £2500 upon the security of a mortgage of the ship; and the mortgage was registered on the following day.

On the 7th of October, 1868, the owners executed a second mortgage of the ship to the Defendants, Messrs. *Wilson & Co.*, to secure the payment of sums due from the owners on a current account. This mortgage was registered on the 19th of October.

On the 24th of October, 1868, the owners signed a letter, by which they gave Messrs. *Leech & Co.* a lien on the accruing freight for £800, which they had borrowed for the purpose of effecting policies of insurance on the ship and freight; and on the same day the Plaintiffs signed a written consent to this advance having priority over their own mortgage.

On the 3rd of November, 1868, the owners gave the Defendants, Messrs. *Wilson & Co.*, a lien on the accruing freight as an additional security for their mortgage debt.

On the 11th of August, 1869, the Plaintiffs, without notice of the last-mentioned charge, advanced a further sum of £1000 to the owners on the security of a mortgage (among other things) of the *Donna Maria*, and all freight thereof then already earned, or which should at any time thereafter be earned under any charter-party then already entered into, or which should at any time thereafter be entered into during the continuance of the security. This mortgage was not registered.

On the 18th of January, 1869, Messrs. *Leech & Co.* gave notice of their charge to the charterers of the ship. On the 9th of February, 1870, Messrs. *Wilson & Co.* gave notice to the charterers of their charge on the freight; and on the 28th of February, 1870, the Plaintiffs gave notice to the charterers that, subject to Messrs. *Leech & Co.'s* charge, they were entitled to all the freight payable under the charterparty.

The ship put into *Queenstown* on her homeward voyage in April, 1870; and on her arrival there she was taken possession of by the Plaintiffs, and was subsequently sold by arrangement between the parties.

The net proceeds of the sale of the ship amounted to £2633 17*s.*, and the freight realised £2123 6*s.* 4*d.*, which last-mentioned sum was paid to the brokers, Messrs. *Rucker & Co.*, as trustees for the persons entitled.

The net proceeds of the sale being insufficient to pay to the Plaintiffs the amount due for principal and interest in respect of their registered mortgage, they claimed to retain the balance out of the proceeds of the freight, subject to the payment of £800 to Messrs. *Leech & Co.*; and they also claimed to tack the sum due on their mortgage of the 11th of August, 1869, to their first mortgage, and to retain the same out of the freight in priority to the charge of the Defendants, Messrs. *Wilson & Co.* They accordingly filed the present bill to establish their claim. The Vice-Chancellor declared that the Plaintiffs, by virtue of the possession taken by them of the ship, became entitled as first mortgagees to receive the freight, subject to the charge of £800 in favour of Messrs. *Leech & Co.*, in priority to the Defendants, Messrs. *Wilson & Co.*; but that the Plaintiffs were not entitled to tack what was due to them on the mortgage of the 11th of August, 1869. From this decision both the Plaintiffs and the Defendants appealed.

Mr. *Pearson*, Q.C., and Mr. *Marten*, for the Defendants:—

We object to the decree because it has given Messrs. *Leech & Co.* priority to us in respect of their advance of £800; although

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we support the decree, in so far as it refuses the Plaintiffs the right to tack their second mortgage against our charge on the freight. We never consented to Messrs. *Leech & Co.* having priority over us, and we did all we could to perfect our security by giving notice to the charterers, which had the same effect as taking possession of the ship: *Rusden* v. *Pope* (1). The principle of the *Merchant Shipping Act*, 1854, is that the right to the freight follows the right to the ship; therefore the priority of claim to the freight depends upon the priority of the registered mortgages: *Cato* v. *Irving* (2). The object of the registry clauses of the *Merchant Shipping Acts* is, that a person before he advances money on a ship may know what are the existing charges. The Plaintiffs can only take the freight in their capacity of first mortgagees; and when the first mortgage is satisfied, the right of the second registered mortgagees accrues.

[They also referred to *Brown* v. *Tanner* (3), *Gardner* v. *Cazenove* (4), *Parr* v. *Applebee* (5), and 17 & 18 Vict. c. 104, s. 70.]

Mr. *Robinson*, and Mr. *Yate Lee*, for the Plaintiffs:—

A mortgagee of a ship has nothing to do with the freight unless he takes possession. When we took possession of the ship we acquired a legal title to the freight, and the notice which the Defendants gave to the charterers is immaterial. Having the legal right to the freight, it cannot be taken from us till all our debt is paid. The sum of £800 advanced with our consent towards the insurance of the ship is on the same footing as money advanced by ourselves. If we had advanced the sum of £1000 in August, 1869, with notice of the Defendants' charge, we might not have been able to tack it to our first mortgage; but we had no notice of the charge.

[They referred to 17 & 18 Vict. c. 104, s. 68; and the 25 & 26 Vict. c. 63, s. 3.]

Mr. *Bardswell*, and Mr. *F. Thompson*, for Messrs. *Rucker & Co.*

Mr. *Pearson*, in reply.

(1) Law Rep. 3 Ex. 269.
(2) 5 De G. & Sm. 210, 224.
(3) Law Rep. 3 Ch. 597.
(4) 1 H. & N. 423.
(5) 7 D. M. & G. 585.

L. JJ.
1872

LIVERPOOL MARINE CREDIT CO. *v.* WILSON.

May 27. SIR W. M. JAMES, L.J., delivered the judgment of the Court as follows:—

The questions in this case are as to the relative rights of a first and second mortgagee of a ship in respect of the freight, each of the mortgagees having taken specific charges on such freight, and the first mortgagee having taken actual possession of the ship before it reached its port of discharge. The facts may be shortly summarised thus: The Plaintiffs are the first registered mortgagees of the ship, their mortgage being for a sum specified, the principal Defendants being the second registered mortgagees also for a sum specified. The second mortgagees then advance money on the security of an express charge on the freight then in course of earning, and completed their title by giving to the charterers notice in writing of their charge. In the meantime the mortgagor is in want of money to effect an insurance on the ship and freight, and borrows and applies £800 for that purpose, giving the lenders a charge on the freight, which the first mortgagees, in writing, agree shall be the prior charge thereon. The first mortgagees afterwards obtain a further express charge on both ship and freight. It is not contended that the first mortgagees had any notice, actual or constructive, of the charge on the freight which the second mortgagees had obtained, or that they had any actual notice of the second mortgage itself. The first mortgagees took actual possession of the ship, and thereby became undoubtedly entitled at law as well as in equity to receive the freight. The ship was sold, and the produce was not sufficient to discharge the first mortgage. It is not denied on behalf of the second mortgagees that to the extent required for the discharge of the first registered mortgage the sale money of the ship and the freight are to be so applied. But they contend that the sale money and freight, being received by the first mortgagees in that character, must be considered and applied as one fund in discharge of the first mortgage, and that the balance ought to go to the second mortgagees in discharge of the second registered mortgage. The first mortgagees, on the other hand, contend that the second mortgagees have no right or equity against them in respect of this application of the freight which they have possessed themselves of by a legal title.

It is to be observed that the *Merchant Shipping Act* nowhere deals

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with charges on freight. They were long before the passing of the Act securities well known in the shipping world, and of ordinary occurrence. And the right of a mortgagee in respect of freight had also been long settled and well recognised. But it was not thought fit to provide by that Act either with respect to the priorities of charges on freight, or with respect to the rights of mortgagees to freight. These were left to be dealt with according to the ordinary principles of law and equity, and the rules and doctrines established by the decisions of the Courts. Now, the right of the mortgagee in respect of freight was well established and clear, but somewhat peculiar. He had no absolute right to the freight as an incident to his mortgage; he could not intercept the freight by giving notice to the charterer before payment; but if he took actual possession, or, according to a recent decision in the Court of Exchequer, if he took constructive possession of the ship before the freight was actually earned, he thus became entitled to the freight as an incident of his legal possessory right, just as a mortgagee of land taking actual possession of the land before severance of the growing crops would have the right to sever and take the crops.

What is the position of a second mortgagee of a ship with respect to the freight? He has no legal right to take actual possession, and cannot therefore by his own act give himself that which is equivalent to possession. But as between himself and the mortgagor the equitable right of the second mortgagee is the same as the legal right of the first mortgagee, just as in the case of land, if the first mortgagee declines to take possession the second mortgagee may obtain a receiver, and so have the possession and the benefits of the possessory right. But this is to be understood only as between the second mortgagee and the mortgagor. As regards the intervening incumbrances, interests, and titles of every kind not requiring registration, the respective positions of the first and second mortgagees are essentially different, arising from the essential difference between a legal and an equitable title. The legal owner's right is paramount to every equitable charge not affecting his own conscience; the equitable owner, in the absence of special circumstances, takes subject to all equities prior in date to his own estate or charge. The Courts of Equity, in appointing a receiver

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at the instance of an equitable incumbrancer, take possession in fact on behalf of all, and so as not to disturb any legal right or interfere with equitable priorities.

If there be a legal mortgage of a ship, then a charge on the freight, then a second mortgage of the ship, the second mortgagee of the ship cannot by any act of his oust the incumbrance on the freight. And if the first mortgagee of the ship takes, under these circumstances possession of the ship, his possession cannot be allowed to alter the equities of the parties. He takes both ship and freight by the same title; and there being one equitable owner of the ship, and another equitable owner of the freight, as between those equitable owners his charge must be considered as satisfied *pro ratâ*, just as if there was a first mortgage on Whiteacre and Blackacre belonging, subject to that mortgage, to several owners.

A due consideration of the same principles shews how is to be solved the question before us, and the right of a legal first mortgagee in possession, being at the same time a puisne incumbrancer without notice on the freight. He has the paramount legal title, there is nothing to affect his conscience, and we are unable to find either on principle or authority any sound distinction between his case and that of the legal mortgagee of any other kind of property who has made farther advances on the property itself, or on the timber or growing crops, without notice of intervening equitable charges or interests.

Having arrived at this conclusion, it is not necessary to deal with the special circumstances affecting the £800 advanced for insuring the ship. We intimated, in the course of the argument, our opinion that that sum must be considered as if it had been advanced by the first mortgagees themselves. We agree with the Vice-Chancellor's decision as to that sum. But we go further than he did, and hold that the first mortgagees are entitled to priority in respect of the whole of their charge on the freight, adding thereto their costs of suit, including their costs of the appeal and the costs which they will have, in the first place, to pay to the person in whose favour the charge for the £800 insurance money was paid. If there should be any surplus, the surplus will go to the second mortgagees; if there should not be enough to pay the first incumbrancers as well as the costs, the deficiency to answer the

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Liverpool Marine Credit Co. *v.* Wilson.

costs must be borne by the second mortgagees, whose contention has led to the suit.

Solicitors for the Plaintiffs: Messrs. *Chester & Urquhart*, agents for Mr. *I. H. E. Gill, Liverpool.*

Solicitors for the Defendants: Messrs. *Thomas & Hollams.*

BETTS *v.* CLEAVER.

[1865 B. 217.]

L. JJ.
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May 24.

19 Eq 477.
10 Eq 85
[illegible]

Costs—Taxation—Three Counsel—Perusing Affidavits.

Where a leader has been employed in a suit but not retained, the costs of employing him as third counsel at the hearing will not be allowed as between party and party, although the junior counsel who drew the pleadings has before the hearing been called within the Bar.

Cousens v. *Cousens* (1) observed upon.

A similar affidavit was filed by the Plaintiff in each of several suits. The solicitor for the Defendants took an office copy of the affidavit in one suit only, and examined at the Record Office the affidavits in the other suits:—

Held, that he was not entitled to charge for perusing the affidavits in the other suits.

Decision of *Bacon*, V.C., reversed.

THE Plaintiff filed the bill in this suit to restrain the infringement of his patent, and he filed fourteen similar bills against other Defendants. The Defendants all appeared by the same solicitor, and it was arranged that the questions should all be raised in this suit alone. The bill in this suit was dismissed with costs on the 29th of June, 1870.

On the taxation of costs the solicitor for the Defendants claimed to be allowed the costs of briefs and fees on the hearing for three counsel, Mr. *Kay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Langley*. Mr. *Eddis* had as junior drawn the answer and advised the Defendant; but before the suit came to a hearing Mr. *Eddis* was called within the Bar. Mr. *Kay* had not been regularly retained, but he had been employed with Mr. *Eddis* on a motion, the order in which was taken by consent, that the cross-examination of the Plaintiff

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(1) Law Rep. 7 Ch 48.

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in one suit should be used in all the suits. The Taxing Master, Mr. *Skirrow*, disallowed the costs of the brief and the fee for Mr. *Kay*.

The Plaintiff had filed in each suit an affidavit of documents, which was stated to have been on a lithographed form, and his solicitor informed the solicitor of the Defendants that it was so, and offered him copies. The Defendants' solicitor took an office-copy of the affidavit in one of the suits. He also attended at the Record Office, and found that the affidavits in the other suits corresponded word for word. He, therefore, did not take any other copies, but he charged in each suit £5 10*s.* 8*d.* for perusing the affidavit, being at the rate of 4*d.* a folio, as under the Regulations of Hilary Term, 1860. This charge was disallowed by the Taxing Master.

The Vice-Chancellor *Bacon*, upon a summons to review the Taxing Master's certificate, ordered it to be referred back to the Taxing Master, with directions to allow the charges (1). Through some mistake, apparently, no one appeared for the Plaintiff upon the hearing of this summons.

The Plaintiff now moved by way of appeal to discharge the order of the Vice-Chancellor.

W.N. (1872) 71.

(1) 1872. Mar. 16. Sir J. Bacon, V.C. said that as to the first objection he should have thought that the Schedule to the Regulations of 1860 was a sufficient authority, as it said that 4*d.* a folio should be allowed to a solicitor for perusing an affidavit. The solicitor in this case did peruse the affidavit by going to the Record Office and perusing the copy which had been filed. There was nothing in the Orders which said that a solicitor must take a copy before he could charge for perusing. His Honour must therefore overrule the Taxing Master in disallowing the sum charged.

As to the other objection, what was the meaning of the word "retainer" as used in the judgment in *Cousens* v. *Cousens* (Law Rep. 7 Ch. 48), His Honour did not understand it to be limited to the case where a paper with a guinea was delivered; His Honour thought that the Lord Justice meant by "retained" "engaged" or "employed" in the course of the case, and as Mr. *Kay* had been so employed, His Honour was relieved from all difficulty, and was glad to follow the decision of Lord Justice *James*. It would be in the highest degree unreasonable that because the counsel who had drawn the pleadings and had advised, happened to be called within the Bar, therefore the client was to be left without his assistance. The rule that there must not be more than two counsel was well understood, and must be acted upon; but the present case was an exception, founded upon rational principles and justice.

Mr. *Swanston*, Q.C., and Mr. *Everitt*, for the Plaintiff:—

Where a third counsel is allowed the cause must be heavy, and there must be a regular retainer. Here there was no retainer, and the motion on which Mr. *Kay* was employed could not have given him such a knowledge of the case as to make it necessary to employ him in all the subsequent proceedings. As to the charge for perusing, the solicitor does not pretend to say that he did really peruse these affidavits.

Mr. *Kay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Langley*, for the Defendants:—

As to the third counsel, it is admitted that if he had been retained his costs would be allowed: *Cousens* v. *Cousens* (1); and the giving the piece of paper called a retainer cannot make any difference. If a counsel has been once engaged in a case the client ought to be allowed to keep him and not be obliged to give the other side an opportunity of availing themselves of any knowledge he may have acquired. At all events, the costs of the leading counsel must be allowed, for it is the costs of the third which have always been the subject of dispute. In *Betts* v. *Clifford* (2) the brief to a common law barrister was allowed, because he had been engaged in the action at law. The suitor must have a junior counsel, and if his original junior counsel is called within the Bar, the suitor must prevent him from being employed on the other side.

As to the perusal, the solicitor did, for all practical purposes, peruse the affidavits. If he had taken the office copies his costs of perusal must have been allowed as a matter of course, and it is very hard that because he saved the Plaintiff the expense of the office copies, he should not be paid for the trouble he took.

Sir W. M. James, L.J.:—

There are two points involved in this case. The first point is, whether the Taxing Master has taken a right view of what was decided in *Cousens* v. *Cousens*, as to the circumstances under which a third counsel is to be allowed.

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(1) Law Rep. 7 Ch. 48.

(2) 1 J. & H. 74.

In that case of *Cousens* v. *Cousens* (1), the Lord Justice and myself affirmed the decision of the Vice-Chancellor, affirming the decision of the Taxing Master. We thought that in that particular case, and under special circumstances, a Defendant was obliged to pay for three counsel. But from the arguments addressed to us to-day I rather think that we must have gone too far in *Cousens* v. *Cousens.* If that case is to govern this case, then it ought not to be held as laying down a rule, which, according to the argument, is simply that because one of the counsel has been called within the Bar there may always be a third counsel allowed. If that is to be an exceptional circumstance, everything is to be an exceptional circumstance—anything would, in fact, bring it within the rule. I think, therefore, that the Taxing Master was quite right in holding that this case was not brought within *Cousens* v. *Cousens.*

I ought to say that where there has been a sort of moral obligation created by giving a retainer, that obligation should not be disregarded. That principle was acted upon by the Vice-Chancellor and the Taxing Master in *Cousens* v. *Cousens.*

The other point is with regard to the fees for perusing the affidavit of documents in each case. I am of opinion that there was in fact no perusal within the meaning of the rule. When it is said that the solicitor is to have a fee of fourpence per folio for perusing, that means fourpence per folio for that professional consideration which is required to determine what step ought to be taken for the client—whether the affidavit requires answering, or excepting to as an unsatisfactory affidavit of documents. Now in this case there were a great number of Defendants, all of them appearing by the same attorney, and all in respect to the same kind of infringement. The solicitor was told that the affidavit of documents was the same in every case, as of course it would be, and no solicitor could have the slightest doubt that it would be so; in fact the affidavits were lithographed. The solicitor says he was not bound to take that statement, and he went to the Record Office to see if the affidavits were the same. But that is not perusing the affidavits; it is only verifying the fact that the one was a copy of the other, just as if they had been so many copies of a published book. I am of opinion, therefore, that the Taxing Master was quite right, and that there was no perusal.

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(1) Law Rep. 7 Ch. 48.

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I am told that if that is to be the rule, then the solicitor will in every case take office copies; but I think that solicitors probably will not incur such needless expense when they have half-a-dozen clients. They will think it not right to incur expense for the purpose of obtaining an opportunity of making a charge. I hope that solicitors—respectable solicitors—will not be actuated by any such motive, and will not in such a case take office copies, notwithstanding the decision that there is to be no charge for the perusal. The order of the Vice-Chancellor will therefore be discharged, and the taxation will remain as it was; but as the Plaintiff did not appear in the Court below, there will be no costs on either side.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Robinson, Son, & Edmonds*; Messrs. *Flux & Co.*

LUCAS *v.* SIGGERS.

[1871 L. 98.]

GRAY *v.* SIGGERS.

[1872 G. 33.]

L. JJ.
1872
March 15, 23.

Practice—Concurrent Suits—Transfer—Costs.

When a bill has been filed in one branch of the Court, and a second bill relating to the same estate has been filed in another branch, the second suit, even when a decree in it has been obtained, will be transferred to the branch of the Court in which the first bill was filed, and the Plaintiffs in the second suit will pay the costs of the application for transfer.

9 Ch 53
28
10 Ch 63
M-H 79/19

BY the will of *James Siggers*, *Martha Siggers* and *C. Tompkins* were appointed executors. The grant of probate of the will was disputed, and on the 21st of June, 1871, *Martha Lucas*, and *M. M. Gray* and *J. S. Gray*, two infants, suing by their next friend, filed a bill in the Court of the Vice-Chancellor *Malins* against *Martha Siggers* and *C. Tompkins*, the executors, and *A. Lucas*, as Defendants. The bill contained allegations which shewed the Plaintiffs to have an interest in the estate in the event of the will being invalid (which allegations appeared to be incorrect), and prayed a

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receiver and injunction *pendente lite*, and prayed for administration of the estate of *James Siggers*.

On the 10th of February, 1872, probate of the will of *James Siggers* was granted to *Martha Siggers* and *C. Tompkins*, the executors; and on the 14th of February, 1872, the infants, *M. M. Gray* and *J. S. Gray*, who took interests under the will, filed a bill (*Gray* v. *Siggers*), by another next friend, in the Court of the Master of the Rolls, against the executors as Defendants, for administration of the estate of *James Siggers*; and on the 17th of February a decree in this suit was obtained.

On the 15th of March Mr. *Gardiner*, for the executors, moved in *Lucas* v. *Siggers*, the first suit, that it might be transferrèd to the Court of the Master of the Rolls.

Mr. *Fry*, Q.C., and Mr. *Rawlinson*, for the Plaintiffs in *Lucas* v. *Siggers*, the first suit, cited *Orrell* v. *Busch* (1).

Their Lordships said that in all cases where there were two suits relating to the same estate, they should follow the rule that, whether a decree had or had not been obtained in the second suit, the second suit should be transferred to the Court in which the first suit was. And after some discussion their Lordships said, that the Plaintiffs in the second suit must pay the costs of the application, as they were aware of the institution of the first suit.

There was, however, a difficulty in drawing up this order, as the Plaintiffs in the second suit had not been served with notice of the motion; and the motion came on again, together with a motion made in both suits by the Plaintiffs in the first suit, that the second suit might be transferred to the Court of the Vice-Chancellor *Malins*.

Mr. *Fry*, Q.C., and Mr. *Rawlinson*, for the Plaintiffs in the first suit.

Sir *R. Baggallay*, Q.C., and Mr. *Gardiner*, for the executors, said that the practice was different when a decree had been made, and cited *Daniell's* Ch. Pr. (2).

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(1) Law Rep. 5 Ch. 467.

(2) 4th Ed. p. 740.

L. JJ.
1872
Lucas
v.
Siggers.
Gray
v.
Siggers.

Mr. *Southgate*, Q.C., and Mr. *Simmonds*, for the Plaintiffs in the second suit, objected that the first suit could not have been carried on, and that no decree could be obtained in it. The allegation of title could not be proved, and, moreover, even the title alleged was displaced by the grant of probate.

Sir W. M. James, L.J., said that the Court could not make any nice distinctions as to the nature of the first suit, and would in all cases adhere to the rule, that when there was an existing suit as to property, and a second suit as to the same property was begun in a different branch of the Court, the second suit should be transferred to that branch of the Court in which the first suit was, and the Plaintiffs in the second suit must pay the costs of the application. That would be the order made on the second motion. The first motion must be refused with costs, as the Plaintiffs in the second suit were not served with notice.

Sir G. Mellish, L.J., concurred.

Solicitor for the Plaintiffs in *Lucas* v. *Siggers:* Mr. *James Mason.*

Solicitors for the Plaintiffs in *Gray* v. *Siggers:* Messrs. *Kynaston & Gasquet.*

Solicitors for the Executors: Messrs. *Nicol & Son.*

Ex parte POOLEY. *In re* RUSSELL.

L. JJ.
1872
May 30.

Bankruptcy—Liquidation by Arrangement—Parliament—Member of House of Commons—Bankruptcy Act, 1869, s. 122.

[illegible]

The direction in section 122 of the *Bankruptcy Act*, 1869, that if within the time therein mentioned the order of adjudication against a bankrupt member of the House of Commons is not annulled and his debts are not fully paid or satisfied, the Court shall certify the same to the Speaker of the House of Commons, is not, by sect. 125, sub-sect. 7, made applicable in the case of a member who has not become bankrupt but whose affairs are in liquidation under Part 6 of the Act.

THIS was an appeal from an order of Mr. Registrar *Roche*, sitting for the Chief Judge.

On the 9th of March, 1870, Sir *William Russell* presented his petition for liquidation by arrangement. On the 7th of April a meeting of creditors was held, and was adjourned till the 28th of April.

On the 20th of April *Pooley* filed his petition for adjudication against Sir *W. Russell,* and it was appointed to be heard on the 4th of May. On the 28th of April the adjourned meeting of creditors was held, and again adjourned until the 26th of May. On the 4th of May an order was made restraining *Pooley* from further proceedings till the 27th of May. On the 26th of May the creditors passed resolutions that the affairs of Sir *W. Russell* should be liquidated by arrangement—that his discharge should be granted on his paying to the trustee, within one month after registration of the resolutions, £4000, and within the same period giving the trustee a covenant or bond for payment of £5000, by five equal yearly instalments, the first to be payable at the expiration of twelve months from the date; that if default was made in payment of the £4000, any creditor might present a petition for adjudication under the *Bankruptcy Act,* 1869, s. 125, sub-sect. 12, and that the several instalments and the £4000 should be applied as part of the debtor's estate, and be in satisfaction of any right to apply under sect. 89 as to the pay or half-pay of the debtor. These resolutions were registered on the 14th of June. Sir *W. Russell* was a member of the House of Commons at the time of filing his petition, and continued such. *Pooley* was a creditor who had proved for £2500.

No dividend having been paid, *Pooley,* on the 2nd of March, 1872, gave notice of motion under the *Bankruptcy Act,* 1869, s. 122, for an order that the following facts might be certified by the Court to the Speaker of the House of Commons, viz., "that the said Sir *W. Russell,* being a member of the Commons House of Parliament, did, on the 9th day of March, 1870, file a petition in the *London* Court of Bankruptcy for the liquidation of his affairs by arrangement, and that a special resolution has been passed in pursuance of the *Bankruptcy Act,* 1869, declaring that his affairs are to be liquidated by arrangement, and has been duly registered, and that, although more than one year has elapsed from the date of the passing of the said resolution, the debts of the creditors

L. JJ.
1872
Ex parte
POOLEY.
In re
RUSSELL.

who proved debts under the said proceedings have not been fully paid," or that *Pooley* might be at liberty to proceed with his bankruptcy petition.

On the 26th of March, 1872, Mr. Registrar *Roche* refused the application with costs. *Pooley* appealed.

Mr. *Swanston*, Q.C., and Mr. *Brough*, for the Appellant:—

Throughout the *Bankruptcy Act*, until we come to Part 6, which relates to liquidation by arrangement, there is not a single reference to liquidation by arrangement. Then sect. 125, sub-sect. 7, extends to liquidation by arrangement the enactments relating to bankruptcy. The Registrar thought that the 122nd section was a penal one, and must be construed strictly; but the Court has construed the reputed ownership clause, which is more penal in its nature, as extending to liquidation by arrangement. The statute 34 & 35 Vict. c. 50, s. 3, for disqualifying bankrupts from sitting in the House of Lords, expressly includes liquidation by arrangement.

[The LORD JUSTICE MELLISH:—That does not shew that a similar case was provided for in the earlier Act.]

[They referred to *In re Amherst's Trusts* (1) and *Ex parte Rayner* (2).]

The Hon. *A. Thesiger* and Mr. *Linklater*, for Sir *W. Russell*, were not called upon.

SIR W. M. JAMES, L.J.:—

By Part V. of the *Bankruptcy Act*, 1869, provisions are made as to persons having privilege of Parliament. Sect. 121 provides that, if a member of the House of Commons is adjudged bankrupt, he shall be and remain during one year from the date of the order of adjudication incapable of sitting and voting in the House, unless within that time the order is annulled or the creditors fully paid or satisfied. Sect. 122 provides that "if within the time aforesaid the order of adjudication is not annulled, and the debts of the bankrupt are not fully paid or satisfied as aforesaid, then the Court shall, immediately after the expiration of that

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(1) Law Rep. 13 Eq. 464.

(2) Law Rep. 7 Ch. 325.

L. JJ.
1872
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time, certify the same to the Speaker of the House of Commons, and thereupon the seat of such member shall be vacant." That section casts on this Court a duty as between this Court and the House of Commons—a duty cast on this Court *ex officio*—and whether it be open or not to any person to come to inform us of the facts on which the present application is founded, the person making it has no more business to read us a lecture as to how we ought to discharge that official duty than to advise us as to how we ought to dispose of any other case in the paper. I am of opinion that the Registrar was right in refusing to certify anything which was not within the express terms of sect. 122. It appears to me idle to contend that sect. 125 has anything to do with the constitutional questions involved in Part V. The sub-sect. 7, to which we have been referred, appears to me clearly to have reference only to the distribution of the debtor's property among his creditors, and to have no application to a case like the present. The Registrar came to a right conclusion; and I trust that this will be the last case in which a stranger will come to instruct the Court how to discharge its official duties.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There is an important difference between Part V. and the other parts of the *Bankruptcy Act*. The other parts of the Act relate to the rights of creditors against the property of the debtor; but Part V., with the exception of sect. 120, relates only to the seat of a bankrupt member of the House of Commons. If sects. 121 to 124 are read by themselves, they relate only to bankruptcy. Sect. 122 directs the Court in certain circumstances to send a certificate to the Speaker of the House of Commons. Are we to send a certificate in the terms of the Act, or to frame another according to the circumstances? We cannot certify in the terms of the Act, for such a certificate would not be correct, and it appears to me that we have no power to certify in any other terms. As this part of the Act does not relate to the rights or remedies of creditors, but only to the vacating the seats of members of the House of Commons, we must be cautious not to put upon it too extended a construction. It is not for us to consider whether there is any substantial difference

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between liquidation and bankruptcy, nor whether it is right and proper that a member of Parliament whose affairs are liquidated by arrangement should lose his seat; we must not interfere unless we see clearly that the Legislature intended us to do what is asked. To send a certificate not in the terms of the Act might, having regard to sect. 123, place the Speaker in great difficulty if it were sent during a recess of the House. The question is, whether sect. 125, sub-sect. 7, makes sect. 122 applicable to the case of liquidation by arrangement. Had Parliament so intended, we should surely have found in sub-sect. 7 some express reference to the subject dealt with in Part V. The words "so far as the same are applicable" shew that there are provisions in the Act which the Legislature considered not to be applicable to liquidation; and there having been no reference to Part V., I think that its provisions are to be treated as not applicable.

I agree with the Lord Justice that the sending the certificate is an *ex officio* duty of the Court of Bankruptcy. I doubt whether we, as a Court of Appeal in Bankruptcy, could properly be applied to on the subject, and I certainly think that in strictness we might have refused to hear any argument on the point.

Solicitors: Messrs. *Harper, Broad, & Battcock;* Messrs. *Linklater, Hackwood, & Co.*

In re HOPE.

L. JJ.
1872
May 31.

11 QBD

Committal under The Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4—*Order on Solicitor to pay Costs.*

A common order was made against a solicitor for delivery of his bill of costs and taxation. He moved to discharge this order, and his application was dismissed with costs. He then appealed, and his appeal was also dismissed with costs:—

Held, that the non-payment of the costs of the appeal was not a default in payment of a sum of money by a solicitor as an officer of the Court within the *Debtors Act*, 1869, s. 4, sub-s. 4, and that an attachment could not be issued against him.

Decision of the Master of the Rolls reversed.

THIS was an appeal from an order of the Master of the Rolls.

Mr. *B. Hope*, a solicitor, had received money amounting to about

L. JJ.
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In re
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£42 from Mr. *G. Hawkins* and others for the purpose of prosecuting certain searches, and of taking proceedings for recovering money in the Court of Chancery which his clients claimed.

In May, 1871, Mr. *Hawkins* took out the common order to compel Mr. *Hope* to deliver his bill of costs and disbursements, and to account for the money received, and to have the bill of costs taxed.

On the 25th of November, 1871, Mr. *Hope* moved before the Master of the Rolls to discharge this order, but the motion was refused with costs.

On the 13th of February, 1872, Mr. *Hope* renewed the motion by way of appeal before the Lords Justices, but the appeal motion was also dismissed with costs.

On the 5th of April a subpœna was issued against Mr. *Hope*, at the suit of Mr. *Hawkins*, for non-payment of the costs of the appeal motion, which had been taxed at £19 9*s.* 8*d.*, and on the 25th of April, the costs not having been paid, an order for attachment was made against him by the Master of the Rolls. The order recited that it appeared to the satisfaction of the Court that Mr. *Hope* had made default in the payment of the above-named costs, and that such a default was a default of a solicitor within the meaning of the *Debtors Act*, 1869.

From this order Mr. *Hope* appealed.

Mr. *Jackson*, for the Appellant:—

The *Debtors Act*, 1869 (32 & 33 Vict. c. 62), abolishes imprisonment for debt in all cases except those mentioned in sect. 4. The exception on which this order is based is contained in sub-sect. 4: "Default by an attorney or solicitor in payment of costs for misconduct as such; or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order." The default in this case came under neither of those descriptions.

Mr. *M. T. Martin*, for Mr. *Hawkins*:—

The order to pay costs having been made in relation to an application to tax a solicitor's bill, the costs must be taken to have been payable by the solicitor in his character as such: *In re Rush* (1).

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(1) Law Rep. 9 Eq. 147.

Costs have been held to be included in the words "sum of money": *Reg.* v. *Pratt* (1).

SIR W. M. JAMES, L.J.:—

It appears to me that the meaning of the Act is quite clear. Its object was to relieve from imprisonment any one whose default in payment of a sum of money arose from poverty. Therefore certain cases were exempted from the operation of the Act, in which imprisonment was a penalty for misconduct.

It is not every case in which a solicitor is ordered to pay a sum of money that he is liable to imprisonment for not paying it; but if he has received money of his client, he is guilty of a breach of duty unless he has it ready when it is called for; and if he makes default, the Court always considers him liable to punishment. That was the case in *In re Rush* (2). There the solicitor had received money of his client, and when called on he was not able to pay it. But that is very different from a case where a solicitor is ordered to pay costs simply as an unsuccessful litigant. He is then to be treated in the same way as any other person under default in payment of costs. The order of the Master of the Rolls must therefore be discharged.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I do not say that if a solicitor in his character of a solicitor were ordered to pay a sum of money with costs, he would not be liable to be imprisoned for non payment of the costs as well as of the original sum recovered. The question is whether the costs are due from him as an officer of the Court. In this case he made the application to the Court as an ordinary litigant, and being unsuccessful was ordered to pay the costs.

SIR W. M. JAMES, L.J.:—I agree that in the case supposed of a solicitor being ordered in his character of solicitor to pay a sum of money with costs, the costs would be considered as included in the sum ordered to be paid.

Solicitors: Mr. *B. Hope*; Mr. *Strangways*.

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(1) Law Rep. 5 Q. B. 176.

(2) Law Rep. 9 Eq. 147.

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June 20.

8 Ch 725
20 Ch D 440

Ex parte DAVIS. *In re* DAVIS.

Bankruptcy—Liquidation by Arrangement—Extraordinary Resolution—Direction to transfer Proceedings to another Court—Filing and Registration of Proceedings—Stamps—Bankruptcy Act, 1869, *s.* 126—*Bankruptcy Rules*, 1870, *rr*. 206, 284, 288.

An extraordinary resolution of creditors presented to a Registrar, under the *Bankruptcy Act*, 1869, s. 126, must have the proper stamp affixed, and must be accompanied by the affidavit required by Rule 284 of the *Bankruptcy Rules*, 1870, verifying the statement of proofs and proxies; otherwise it cannot be received by the Registrar, either for the purpose of filing or of registration.

A direction to transfer the proceedings to another Court, under Rule 288 of the *Bankruptcy Rules*, 1870, is part of the resolution in which it is inserted, and has no validity till such resolution has been registered.

THIS was an appeal from an order of the Judge of the *Oldbury* County Court, *Staffordshire*.

Richard Davis, a debtor residing within the district of the *Oldbury* County Court, filed a petition for liquidation by arrangement in the *Oldbury* County Court.

The first meeting of his creditors was held on the 12th of February, 1872, when an extraordinary resolution was passed, under the 126th section of the *Bankruptcy Act*, 1869, by which the creditors accepted a composition of 10*s*. in the pound.

On the 24th of February the second meeting was held, at which the resolution was duly confirmed, and the creditors added to the resolution a direction, under Rule 288 of the *Bankruptcy Rules*, 1870, that the proceedings should be transferred to the *Walsall* County Court, which is four miles distant from the *Oldbury* County Court, and under the same Judge, but under a different Registrar.

The solicitor for the debtor presented the resolution to the Registrar of the *Oldbury* County Court, and requested him to file the resolution and to transfer the proceedings forthwith to the Registrar of the *Walsall* County Court. The Registrar, however, refused to transfer the proceedings on the following grounds:—

First, that the proofs of proxies produced at the meetings when the resolution was passed, and the debtor's statement, were not verified by affidavit in accordance with Rule 284 of the *Bankruptcy Rules*, 1870.

Secondly, that the resolution was not stamped with the *ad valorem* stamp required by the Lord Chancellor's Order of the 10th of August, 1871.

Thirdly, that the direction for transfer was not passed at the first meeting, and that no notice was given to the creditors that it would be passed at the second meeting.

The debtor then applied to the County Court Judge for an order directing the Registrar to transfer the proceedings, but the Judge agreed with the opinion of the Registrar, and refused to make the order.(1) The debtor appealed from this decision to the Chief Judge, who dismissed the appeal with costs, and the debtor now renewed the application before the Lords Justices (1).

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(1) The *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 126, enacts as follows:—

"The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the Registrar; and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, and if satisfied that it has been so passed, he shall forthwith register the resolution and statement of assets and debts; but until such registration has taken place such resolution shall be of no validity, and any creditor of the debtor may inspect such statement at prescribed times, and on payment of such fee, if any, as may be prescribed."

The *Bankruptcy Rules*, 1870, which were chiefly referred to in the argument were the following:—

Rule 206. "Every officer of the Court who shall receive any document to which an adhesive stamp shall be affixed shall immediately upon the receipt of such document deface the stamp thereon by writing, partly on the stamp and partly on the document, the name of the debtor; and no such document shall be filed or delivered until the stamp thereon shall have been defaced in manner aforesaid; and it shall be the duty of the party presenting or receiving such document to see that such defacement has been duly made."

Rule 284. "The person to whom the registration of the special or extraordinary resolution may have been entrusted, or the debtor or his attorney, as the case may be, shall file the same in Court, together with the debtor's statement of affairs and all proofs and proxies, within three days after he shall have received the same, or in default thereof shall be summoned before the Court, and some person able to depose thereto shall verify and identify the resolutions, statement, proofs and proxies so filed as being the whole of the resolutions, statement, proofs, and proxies come to and produced at the meeting or meetings when such special or extraordinary resolutions were passed."

Rule 288. "The creditors assembled at any general meeting may include in their resolution a direction that the proceedings be transferred to any Court other than that in which the same were originated, and upon any such resolu-

(1) S C 20 W R 622.

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Mr. *Kay*, Q.C., and Mr. *Robson*, for the Appellant, contended that there was a distinction between filing and registering the resolution. The resolution to transfer the proceedings did not require to be registered before it was acted upon. The duty of the Registrar was to file the extraordinary resolution within three days; and then, before registering it, he could test its validity by the production of the requisite affidavit, and see that it was stamped.

If, as in the present case, there was a direction to transfer the proceedings, this could be at once done, and the testing and registration of the resolution could be performed by the Registrar of the Court to which the matter was transferred. If the creditors had a preference for one Court rather than another, they had a right to exercise their choice. They referred to the *Bankruptcy Rules*, 1870, rules 206, 284, 288, and 295.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Registrar, urged that the direction to transfer was part of the extraordinary resolution, and till the resolution was registered it had no validity. The *Bankruptcy Act*, 1869, sect. 126, sub-sect. 5, was imperative on that point. And it could not be registered without a stamp and without the requisite affidavit. They referred to the Order in Bankruptcy of the 10th of August, 1870, as to stamps.

Mr. *Robson*, in reply.

SIR W. M. JAMES, L.J., after shortly alluding to the circumstances under which the appeal was brought before the Court, continued:—

Independently of the question of the stamp, which seems to me an important one, the case depends upon Rule 288, which provides "that the creditors assembled at any general meeting may include in their resolution a direction that the proceedings be transferred to any Court other than that in which the same were originated, and upon such resolution being filed the proceedings shall be forthwith transferred by the Registrar in accordance therewith."

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tion being filed the proceedings shall be forthwith transferred by the Registrar in accordance therewith; and the Court to which the same shall have been transferred shall thereafter act in the matter of the proceedings in like manner as if the same had been properly instituted therein in the first instance."

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Now I read that rule, independently of the word "filed," that there is to be a direction included in a resolution. I cannot myself doubt that it was intended, not that there should be a distinct resolution for the purpose of submitting the other resolutions and all other proceedings to one Court instead of another, but that in a resolution, whether it was a special resolution or an extraordinary resolution, there should be, as a part of it, a direction that the proceedings should be transferred. It seems to me that that is a very important part of the resolution, which requires to be authenticated and verified as completely as anything else in the whole of the proceedings. Then the rule says, that "upon the resolution being filed the proceedings shall be forthwith transferred by the Registrar." It appears to me that the Registrar has a right to see that the piece of paper that is produced is in every respect complete. It is not because a piece of paper purporting to be a resolution is presented to him that he is to do what he is asked to do, but he is in the position of every other public officer who is asked to part with something entrusted to him by law. It is his duty to see that there is the proper authority—in this case the requisite resolution. Then what is the resolution? The resolution, according to my view, is one that has been passed by a certain statutory majority either at one or two meetings. The Act of Parliament is plain, and the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled the rule must give way to the plain terms of the Act. The 126th section of the Act says, that "no resolution shall be of any validity whatever, unless and until it has been registered." If, therefore, this rule had in terms said that, notwithstanding the Act of Parliament, the resolution, so far as it contained a direction to transfer the proceedings should be valid, before registration it would have been *ultrà vires,* and on the face of it a repeal of the Act of Parliament. It seems, therefore, to me that "upon the resolution being filed" must mean "upon the resolution being presented for registration." If necessary I should read the word "filed" as "registered," that is to say, as soon as a resolution which the Court can take cognizance of has directed the transfer, it was then, no doubt, intended that the proceedings should be forthwith transferred. That can only be when the Registrar has satisfied himself that

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there is a binding resolution directing him to do it. Then it is argued that it might be convenient for the creditors to have the verification of that meeting done at one Court instead of another, but I do not think that it was intended that the persons themselves, the validity of whose acts was to be the subject of question, should have the liberty of transferring the matter to what Court they pleased for the purpose of determining whether they were the requisite majority of the creditors, and whether they had arrived at a valid resolution. The most convenient course would seem to be, that the resolution should be authenticated by the Registrar in the same way as any other resolution would require to be authenticated, with respect to either bankruptcy or liquidation by arrangement, and that an uncertain meeting of persons of whom nothing is known, and who may have no interest in the matter, should not be able to give directions as to what Court should conduct the investigation.

With regard to the stamps also, I am clearly of opinion that the Registrar had no right to look at the resolution for any purpose whatever, and possibly that may be the reason why the direction is to be included in a resolution. That resolution cannot be looked at by the Registrar or by the County Court Judge; it cannot be looked at by the Chief Judge, and it cannot be looked at by us; we cannot know that there has been such a resolution passed unless that resolution has upon it the stamps which, for the purpose of providing funds for the administration of justice, the Legislature has required.

I am of opinion, therefore, that the decision of the Chief Judge is perfectly right, and ought to be affirmed with costs.

Sir G. Mellish, L.J.:—

It is important to remark that neither the 126th section nor, I believe, any other section of the Act of Parliament, says anything at all about filing the resolution. There is therefore no difficulty about the construction of the section; and there can be no doubt that what is meant by "presenting the resolution" is the bringing in the resolution and handing it over to the Registrar for the purpose of registration; and what the Act of Parliament contemplated was that he was then to enter into an inquiry whether it had been properly passed, and if he found that it had, then he

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was to register it, and until he registered it it was to be of no validity whatever. Therefore, as far as that section is concerned, there is no difficulty, but the Rules have unquestionably introduced a considerable difficulty by providing what the Act of Parliament did not provide, namely, that the resolution is to be filed before it is registered. But then by the General Order of the 10th of August, 1871, respecting fees in bankruptcy "every extraordinary resolution presented to a Registrar under sect. 126" is to have a certain stamp affixed; and by the order of the Lords Commissioners of the Treasury annexed to that order it is directed "that the stamp shall be affixed or the money paid in respect of every fee before the proceeding is had in respect of which the fee is payable." That certainly appears to me to direct in very plain terms that the stamp shall be affixed before the resolution shall be presented to the Registrar; so that, interpreting the section of the Act by that order, I think it clear that "presenting to the Registrar" means when it is first brought in to the Registrar, and that is in substance what the County Court Judge decided, for he held that the Registrar had no right to take any steps at all upon this resolution until it was stamped. I am of opinion that that is a correct decision.

As to the other point, I confess I have had a very great difficulty, for although I cannot say that I differ from the view taken by the Chief Judge and the Lord Justice, yet it appears to me certainly that the 288th rule is really calculated to deceive the public. Because when persons read a rule that they may make it part of their resolution that the proceeding shall be changed to another Court, and then the rule goes on to say that "that is to be done forthwith after the resolution is filed," they would be surprised to find that the true construction is, that it is not to be done until after the resolution is registered. But though in the course of the argument I had very great doubt upon that question, I do not say I differ from the conclusion to which the Lord Justice has come; and I have a very clear opinion on the question of the stamp.

Solicitors for the Appellant: Messrs. *Duignan & Co.*

Solicitors for the Respondents: Messrs. *Wilkins, Blyth, & Marsland.*

L. JJ.
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June 20, 21.

18[illegible]
14 Ch D 718
722
15 Ch D. 127.

Ex parte CLAXTON. *In re* CLAXTON.

Bankruptcy — Annulling Adjudication on Equitable Grounds — Intention to embarrass Chancery Suit — Bankruptcy of Next Friend— Bankruptcy Act, 1869, *s.* 8.

A., who was a Plaintiff in an administration suit, and also next friend of the infant co-Plaintiffs, was ordered to pay the costs of certain interlocutory proceedings in the suit to the Defendants. The money not being paid, the Defendants took out a debtor summons against *A.*, and obtained an adjudication of bankruptcy against her:—

Held, that the bankruptcy of the next friend would not embarrass the Chancery suit, and therefore there was no equitable ground of defence to the adjudication of bankruptcy.

Whether the old rule as to staying proceedings or annulling the adjudication on equitable grounds, is applicable to proceedings under the *Bankruptcy Act*, 1869, *quære;* but if so, the question ought to be raised by special application and not by way of defence to the adjudication.

THIS was an appeal from an order of the Registrar, sitting as Chief Judge in the *London* Bankruptcy Court, by which he adjudicated the Appellant, *Emily Claxton*, a bankrupt.

On the 25th of April, 1870, the Appellant and her three infant children, by the Appellant as their next friend, filed a bill in Chancery against the trustees of the will of *Noah Claxton* for the administration of the testator's estate.

In the course of the suit the Appellant was ordered to pay to the Defendants the costs of certain interlocutory applications to the Court, which were taxed at £63 1*s.* 6*d.*

On the 16th of December, 1871, the Defendants served on the Appellant a subpœna to enforce payment of these costs. On the 15th of January, 1872, they took out a debtor summons against her for the same debt, and the money not being paid, on the 25th of April, 1872, they obtained an order of adjudication of bankruptcy against her. She now appealed from the order upon the ground that the object of the petitioning creditors was not for the legitimate purposes of bankruptcy, but to impede or defeat the proceedings in Chancery.

The only personal interest which the Appellant had in the estate which was being administered in the suit, was an annuity of £20, payable to her under the testator's will.

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Mr. *Karslake*, Q.C., and Mr. *Brough*, for the Appellant:—

Before the *Bankruptcy Act*, 1869, the Court has constantly annulled adjudications, on the ground that they were obtained for some other object than the legitimate purpose of bankruptcy. Under the present Act it is not now necessary to wait for the adjudication to be made, for by the 8th section the Court "may adjourn the petition either conditionally or unconditionally for the procurement of further evidence, or for any just cause, or may dismiss the petition with or without costs, as the Court may think just." In this case it is clear that the object of the petitioning creditors was simply to impede the suit by making the next friend a bankrupt; for if they had only wished for payment of their debt they would have proceeded by sequestration against the annuity of £20 which was coming to the Appellant in the suit, or committed her under the *Debtors Act*, 1869. This is a stronger case than any reported case on the subject, for the petitioning creditors were the accounting parties in the suit: *Ex parte Kemp* (1); *Ex parte Bourne* (2); *Ex parte Upfill* (3); *Ex parte Browne* (4).

Mr. *Phear*, for the petitioning creditors, was not called on.

SIR W. M. JAMES, L.J.:—

This is an appeal from an order of the Registrar by which the Appellant was adjudicated bankrupt. I am of opinion that the Registrar had no discretion, but was bound *ex debito justitiæ*, the facts required by the Act being proved, to make the adjudication. Whether the old rule as to staying the proceedings or annulling an adjudication on equitable grounds is or not applicable to proceedings under the *Bankruptcy Act*, 1869, is a matter of great importance, but not necessary now to be decided. But it appears to me that the mode of raising the question in a proper case would be by special application to stay the proceedings or to annul the adjudication, and not by way of defence to the order for adjudication. On such a special application the Court could give such equitable relief as it might think just, and might introduce such terms and make such arrangements as might be required.

(1) 1 M. D. & D. 657.
(2) 2 Gl. & J. 137.
(3) Law Rep. 1 Ch. 439.
(4) 1 Rose, 151.

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In the present case, however, I do not desire to put the parties to make a fresh application, for I am satisfied that there are no sufficient grounds for applying the rule in this case. The Defendants obtained an order against the next friend for payment of costs. The money not being paid, they had a right to enforce its payment, and bankruptcy is one remedy which the law provides for such purpose. They had a right to take her property by making her a bankrupt, even at the risk of embarrassing the Chancery suit; for I cannot see on what ground a Defendant is obliged to let a Plaintiff keep property to which the Defendant has a claim for fear of embarrassing a Chancery suit. But, in truth, in this case the bankruptcy will not embarrass the suit at all. The bankrupt will still remain the next friend of the infants (unless the Court should think fit to remove her, which is not likely), and the same solicitor will continue to conduct the suit, with the same power of carrying it on as before, provided he only obtains a common supplemental order to bring the trustee of the bankrupt's estate before the Court. There is, therefore, no foundation of fact in the present appeal, and it must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitor for the Appellant: Mr. *F. Andrew.*
Solicitors for the Respondents: Messrs. *Westall & Roberts.*

L. JJ.
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May 30.

Ex parte SNOWBALL. *In re* DOUGLAS.

Bankruptcy—Mortgage by Partner of Partnership Property—Power of Attorney—Notice of Act of Bankruptcy—Act of Bankruptcy under former Act—Repeal—32 & 33 *Vict.* c. 83, s. 20.

M. D. and *J. D.* were carrying on business in partnership. In September, 1869, *J. D.* gave to *J. A. M.* a power of attorney, authorizing him to sell certain property of *J. D.*, including a particular ship which was in fact partnership property, and then went abroad. In November a mortgage deed was executed, by which, after reciting that the partners and each of them were indebted to *S.* in an amount not ascertained, *M. D.* and *J. D.* purported to convey to *S.* property which formed nearly the whole assets of the partnership,

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to secure all moneys which then were or might thereafter become due to *S.* from the partners or either of them. At the same time a bill of sale was executed, by which *J. D.*, with the concurrence of *M. D.*, purported to assign the ship to *S.* absolutely at a certain price, subject to the incumbrances thereon. These deeds were executed by *M. D.* and by *J. A. M.* as attorney for *J. D.* In April, 1870, *M. D.* and *J. D.* were adjudged bankrupts; the act of bankruptcy by *J. D.* being his leaving *England* in September, 1869, with intent to defeat or delay his creditors. The County Court Judge held that the execution of the mortgage on behalf of *J. D.* was void, as not coming within the scope of the power of attorney, but that the mortgage was valid as the deed of *M. D.* alone, being, in his opinion, executed to secure an antecedent debt, and further advances made on the promise of having security for the whole, and that its effect was to make *S.* and the trustee in bankruptcy tenants in common of the mortgaged property. He held the bill of sale to be good, being of opinion that though *S.* knew circumstances from which it was reasonably to be inferred that *J. D.* left *England* with intent to defeat or delay his creditors, this could not prevail against the positive oath of *S.*, that he believed that *J. D.* had left *England* only to make a purchase and would speedily return, and that he, *S.*, did not suspect the firm of being insolvent. On appeal the Chief Judge held the mortgage to be an act of bankruptcy and therefore void, and the bill of sale to be void on the ground that the power of attorney was revoked by the act of bankruptcy committed by *J. D.*:—

Held, on appeal to the Lords Justices, that the mortgage was wholly void as against the trustee, for that by it *M. D.*, knowing the firm to be insolvent, attempted to make the partnership property a security for separate debts of himself and *J. D.*, which was a fraud on the creditors of the partnership and an act of bankruptcy:

Held, also, that although a power of attorney is not for all purposes revoked by an act of bankruptcy, and a sale under it to a purchaser who had no notice of an act of bankruptcy would be good as against the trustee under a subsequent adjudication, the bill of sale was void, for that *S.* knew facts which were sufficient to inform him that *J. D.* had committed an act of bankruptcy, and he could not escape the consequence by saying that he had not drawn this inference from them.

The effect of an act of bankruptcy under the former law is saved by the repealing section (20) of 32 & 33 Vict. c. 83.

THIS was an appeal by *William Snowball* from an order of the Chief Judge in Bankruptcy varying an order of the County Court Judge at *Sunderland* and setting aside a mortgage dated the 27th of November, 1869, and a bill of sale of the same date.

The bankrupts, *Martin Douglas* and *John Douglas*, for some years before their bankruptcy carried on the business of wire-rope makers at *Sunderland*. *Snowball* was a solicitor at *Sunderland*, and for some years he acted professionally for the bankrupts, both as partners and individually, and also made advances to them and accepted bills for their accommodation. On the 14th of September, 1869, *John Douglas*, who was the managing partner in the firm, and the son of *Martin Douglas*, left *England* for *America*. He professed to leave *England* for the purpose of purchasing land in *America*, with money which belonged to his wife, and told his father and Mr. *Snowball* that he would return in two or three months. The firm was in difficulties at the time he left. An execution had been levied on the partnership property, and *John Douglas* had himself been arrested on an absconding debtor summons, for a debt of £800, shortly before his departure; but the partners had succeeded in raising money to pay both debts. *John Douglas* never returned from *America*, and both the County Court Judge (1) and the Chief Judge were clearly of opinion that he had

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(1) The County Court Judge on this point expressed himself as follows:—"At the time *John Douglas* left the country the firm was insolvent; their joint unsecured liabilities amounted to £8000 and upwards. Mr. *Snowball*, in his depositions and affidavit, stated that he was not aware that the firm was insolvent at the time the bankrupt, *John Douglas*, left the country; and that he believed him when he told him that he intended to return to *England* in two months, and that he never suspected he was going abroad to defeat or delay his creditors. These statements appear to me rather singular, considering that Mr. *Snowball* had acted as the solicitor of the firm for many years; had been concerned as their solicitor in various transactions; had been in the habit of accepting and indorsing bills for their accommodation; had been applied to about that time to advance them money to pay wages and carry on their business, and that at that time the firm owed him a considerable sum of money, and he had accepted or indorsed for them bills for a very large amount. I should have thought that Mr. *Snowball*, from the knowledge he must necessarily have of their affairs, would have strongly suspected, if he did not absolutely believe, that *John Douglas* went abroad for the express purpose of settling in *America*, and thereby defeating and delaying his creditors. Why should he wish to sell all his wife's property in *Sunderland*, and purchase with the proceeds thereof an estate in *America*, if he did not intend to remove his family and settle in *America* immediately, or as soon as he had sold his wife's property in *Sunderland* and had purchased an estate in *America*? At that time his eldest son was only fourteen, therefore it could not be with a view of sending him out alone to settle in *America* that he was desirous of purchasing property in that country. As, however, Mr. *Snowball* has positively sworn that he had no notion that the firm was insolvent, and that he verily believed that *Douglas* fully intended to return to this country in a short time, it is not for me to set my conjectures against his positive assertion . . . . There can be really no doubt that *John Douglas* went to *America* with intent to defeat or delay his creditors. Mr. *Snowball* denied that before

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committed an act of bankruptcy by departing from the realm with intent to defeat and delay his creditors. Before *John Douglas* left *England* he executed a power of attorney, dated the 14th of September, 1869, by which he authorized one *John Anthony Moore* to act for him in this country. It enabled *Moore* to sell lands and receive the price for which the lands might be sold, and to execute conveyances on his account, and also to sell a certain ship and receive the price, and generally gave very extensive powers for the management of his private affairs; but it contained no reference to the affairs of the partnership.

The bankrupts were the owners of the ropery and paintworks in which their business was carried on, and which had been conveyed to them as tenants in common. These premises, with the plant, engine, machinery, utensils, and other implements and effects thereon, had been mortgaged on the 26th of December,

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the execution of these deeds he had heard that an execution had been put into the bankrupt's premises, or that *John Douglas* had been arrested under the *Absconding Debtors Act*, or that *John Douglas* had left the country with intent to defeat or delay his creditors. On the contrary, he said that he fully believed that *John Douglas* had gone to *America* to buy an estate to settle his sons on, and would return in two or three months; but he did not say to continue his business. I have already made some observations on Mr. *Snowball's* statement, that it never struck him that the bankrupt had gone to *America* to defeat or delay his creditors. Mr. *Snowball* and Mr. *Wright*, in their affidavits, state that they believed that if the bankrupts were relieved in the four matters stated or referred to in Mr. *Wright's* affidavit they could continue their business. It may be so, but still it is very singular that they should entertain this opinion, seeing that the managing partner, who knew the affairs of the concern, had gone abroad for several months, when he must have known that the firm was very much embarrassed, in fact insolvent. But to render these deeds void, on the ground that *John Douglas* had committed an act of bankruptcy, it would be necessary to shew, not only that Mr. *Snowball* was aware that *John Douglas* had gone to *America*, but also that he had done so with intent to defeat or delay his creditors. Now there is no positive evidence to contradict the evidence of Mr. *Snowball* and Mr. *Wright*, that they believed that he had merely gone to *America* to purchase an estate with his wife's fortune, or rather with the proceeds of the sale of his wife's property, and would return in a month or two; and that they believed the assertion of *Martin Douglas*, that if the firm was relieved from the four matters which pressed upon them they could continue their business. I therefore feel compelled to reject this ground of objection to the validity of the deeds."

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1867, to a Mrs. *Stack*, to secure £800 and interest, and had been subsequently mortgaged to the *Northern Counties Loan and Discount Company* for £1000; but the sum due on this second mortgage had been reduced to £400. The ship referred to in the power of attorney was a ship which was in course of building for the firm in *Liddle & Sutcliffe's* yard, and though she was the property of the firm, charges upon her in favour of a Mr. *Thompson* had been created in the name of *John Douglas* alone.

Shortly after *John Douglas* left *England* negotiations were carried on with a Mr. *Leadbitter* for a loan of £2500 for the partnership, but these negotiations came to nothing. After this, towards the end of October, 1869, *Martin Douglas* applied to Mr. *Snowball* for further assistance, and borrowed several small sums from him to pay weekly wages. The sums so advanced up to the execution of the deeds in question amounted to about £160. There were, according to the evidence, four matters which pressed upon the bankrupts. First, they were unable to provide money and materials to finish the ship they were building in *Liddle & Sutcliffe's* yard; secondly, Messrs. *Liddle & Sutcliffe's* assignees were pressing them for payment of £315 which was due to them for the purchase-money of the tenancy of the shipyard, and the fixtures, materials, and timber thereon; thirdly, the *Northern Counties Loan and Discount Company*, the second mortgagees of the ropery and works, had threatened to take possession of and sell them unless the sum of £400 due on their mortgage was paid; and fourthly, the *Phœnix Building Society*, in which the bankrupts had sixteen £50 shares, and on which about £180 arrears were then due, were about to forfeit and sell the shares unless the arrears were paid. According to the evidence of Mr. *Snowball* and Mr. *Wright*, his solicitor, Mr. *Snowball* refused to give any assistance to Messrs. *Douglas* in respect of these difficulties unless Messrs. *Douglas* would give him security for the whole of the past debt, then amounting to nearly £4000, due from Messrs. *Douglas* to him, but promised that if they gave him such security he would relieve them from the above-mentioned liabilities by taking transfers to himself of the mortgages and building shares, advancing money to pay *Liddle & Sutcliffe's* assignees, and purchasing the ship. No such agreement, however, was recited in the mortgage deed or the bill of sale of the ship, nor was it contained in any written document. The County Court Judge appeared to have come to the conclusion that some such agreement was actually made, but the Chief Judge was of a contrar opinion, and thought that the sole real object of the whole arrangement was simply to protect and give a benefit to Mr. *Snowball.*

On the 17th of November, 1869, the two deeds were executed. The first was a mortgage expressed to be made between *Martin Douglas* and *John Douglas* of the one part, and *Snowball* of the other part, by which, after reciting the title of the partners to the ropery and paintworks, and the mortgage to Mrs. *Stack,* and that to the *Northern Counties Loan and Discount Company,* and reciting that the mortgagors, and each of them, were indebted to *Snowball* in various sums of money on account current, the amount of which had not been ascertained, and that *Snowball* was also likely thereafter to advance other sums of money to or for them and each of them, and had incurred and might thereafter incur liabilities for them, or both or one of them, and that it had been agreed that the payment of all such sums of money then due or thereafter to become due to *Snowball,* should be secured in manner therein appearing, the mortgagors jointly and severally covenanted with *Snowball* to pay on demand all moneys then due or to become due from the mortgagors or either of them. They then conveyed to *Snowball* in fee, subject to the prior mortgages, the ropery and paintworks, including such part of the plant, engines, boilers, machinery, utensils, implements, effects, articles, and things in, about, or belonging to the said rope and paintworks, hereditaments, and premises, or used or employed in or about the same or in or about the trade or business carried on therein, as were of the nature of real estate. The deed also contained an assignment to *Snowball* of such parts of the plant, machinery, &c., as were of the nature of personal estate, also their sixteen shares in the *Phœnix Provident Building Society.* The proviso for redemption was on payment on demand of all the moneys which then were or at any time thereafter should become due and owing to *Snowball* from the mortgagors or either of them, including interest on the balance which should remain due when the account current between them was closed from the time of such

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balance becoming due, and interest on all such sums of money as *Snowball*, his executors, administrators, and assigns, should be liable to or had engaged or guaranteed to pay for the mortgagors or either of them from the time or separate times of advancing or paying the same. The deed contained a power to *Snowball* to take possession of the mortgaged property on default in payment for twenty-four hours after demand in writing.

The bill of sale was expressed to be made between *John Douglas* of the first part, *Martin Douglas* of the second part, and *Snowball* of the third part. It recited the contract with the shipbuilders to build the ship for *J. Douglas & Co.*, and two charges on that contract in favour of *George Thompson* for £1000 and £500 respectively, and that the building of the ship had proceeded so far that she was ready for launching, and that *John Douglas* had contracted to sell the ship to *Snowball* for £220, subject to *Thompson's* charges, and that *Martin Douglas*, being a partner in the firm of *J. Douglas & Co.*, had agreed to join in the bill of sale to ratify and confirm the same, and then *J. Douglas*, in consideration of £220 expressed to be paid to him, assigned, and *Martin Douglas* ratified and confirmed, the ship to *Snowball* absolutely.

Both deeds were executed by *Martin Douglas* and were also executed by *Moore* on behalf of *John Douglas*, under the power of attorney. Mr. *Snowball* gave Mr. *Wright* £420, out of which Mr. *Wright* paid £220 to Mr. *Moore* as the price of the ship which Mr. *Moore* retained for an alleged debt due to him from the partnership, and paid £200 to *Liddle & Sutcliffe's* assignees. It was not, in the opinion of the Lords Justices, clear whether the £200 was a loan to the bankrupts, or either of them, or was the price paid by *Snowball* for the ship's stores. After the deeds were executed Mr. *Snowball* paid off the prior mortgages on the ropery and the arrears on the building shares, and procured those mortgages and the shares to be transferred to himself. In December, 1869, Mr. *Snowball* took possession of the ropery and the machinery and plant therein, and sold the stock in trade.

On the 27th of April, 1870, *Martin Douglas* and *John Douglas* were adjudged bankrupts, the act of bankruptcy in the case of *Martin Douglas* being a failure to pay the debt claimed in a trader debtor summons served on him in January, 1870, and in the case of *John Douglas*, the leaving *England*, as mentioned above.

On the 8th of February, 1872, the County Court Judge, on the application of the trustee, made an order declaring that the mortgage deed of 17th of November, 1869, was not void as being an act of bankruptcy or fraudulent as against the creditors of the bankrupts, but that so far as it related to the estate and interest of the bankrupt *John Douglas* in the premises comprised therein it was null and void, and that *Snowball* and the trustee in bankruptcy were tenants in common of the ropery and paintworks, and other premises comprised in the deed, subject to the mortgage and charges existing thereon before the execution of the deed—that the bill of sale of the 17th of November, 1869, was a valid bill of sale, and that the stock in trade and other articles which had been sold by *Snowball* for £118 2*s.* 9*d.* were part of the partnership property of the bankrupts, and were not comprised in the mortgage deed; and *Snowball* was ordered to pay over that sum to the trustee.

The trustee appealed from this order, except that part of it which related to the stock in trade and articles sold by *Snowball*; and *Snowball* appealed from so much of it as declared that the first-mentioned deed, so far as related to the estate and interest of *John Douglas*, was null and void, and that *Snowball* and the trustee were tenants in common of the ropery and paintworks and other premises comprised therein; and from so much of it as declared that the stock in trade so sold by *Snowball* was partnership property not comprised in the deed.

On the 11th of March, 1872, the Chief Judge made an order on the two appeals by which his Honour discharged the declarations relating to the mortgage deed and the bill of sale, and substituted a declaration that both the deed and bill of sale were null and void as against the creditors of the bankrupts, and dismissed the appeal of *Snowball* with costs.

Snowball now appealed from this order.

Mr. *De Gex*, Q.C., and Mr. *Winslow*, for the Appellant:—

The mortgage deed, if void, can only be void because it is an act of bankruptcy, but the old Acts are repealed, and this deed, which was executed before the new Act, could not be relied on as an act

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of bankruptcy under it. *Ex parte Bailey* (1); *Maggs* v. *Hunt* (2). The deed can only be void by relation: *Allen* v. *Bonnett* (3); *Jones* v. *Harber* (4). The repealing section is sect. 20 of 32 & 33 Vict. c. 83.

[The LORD JUSTICE MELLISH:—Is not the liability to be made a bankrupt for an act done under the old law saved by that section?]

We submit not. Suppose an act of bankruptcy committed before the new Act which under the new is not an act of bankruptcy.

[The LORD JUSTICE JAMES:—I see no reason why the bankruptcy might not relate back to that; but that question does not arise. If the statute had made some new act of bankruptcy you could not treat it as an act of bankruptcy unless done after the Act came into operation; but here the act was an act of bankruptcy when done, and is so now. Do you mean to say that the new act wipes out all previous acts of bankruptcy?]

That would be reasonable.

[The LORD JUSTICE JAMES:—I should say it would be very unreasonable. The case must proceed on the merits. You are asking us to put a non-natural construction on the Act in order to produce an absurd result.

The LORD JUSTICE MELLISH concurred.]

Snowball's advances were made on a promise that he should have security: *Ex parte Tempest* (5).

[The LORD JUSTICE MELLISH:—That case belongs to quite another class; it related to fraudulent preference. In order to support this deed must there not have been an agreement to give security which was enforceable in equity?]

We submit not: *Hutton* v. *Cruttwell* (6); *Harris* v. *Rickett* (7). A further advance was made at the time, and the contract was a *bonâ fide* contract made with a view of enabling the debtors to continue their business. Even a small present advance will make the security good: *Lomax* v. *Buxton* (1); *Kevan* v. *Mawson* (2); *Woodhouse* v. *Murray* (3). Then as to the execution by *John Douglas*, the power of attorney is wide enough to authorize the execution of this deed. The Chief Judge seems to have thought that an act of bankruptcy revoked it; but we submit that cannot be maintained, and that the deed is as good as if executed by *John Douglas* in person. No doubt if *Snowball* had notice of the act of bankruptcy the assignment by *John* would be invalid as against the trustee; but we submit the County Court Judge was right in holding that he had not. But suppose he had, we contend that *Martin's* execution alone was sufficient, for one partner can deal with the assets; and this rule, we submit, applies to real estate, which is partnership property as well as to chattels. : *Lindley* on Partnership (4); *Harvey* v. *Crickett* (5); *Morgan* v. *Marquis* (6); *Ex parte Robinson* (7). The declarations of the bankrupt in the course of the transactions are evidence: *Ridley* v. *Gyde* (8).

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(1) Law Rep. 13 Eq. 314.
(2) 4 Bing. 212.
(3) Law Rep. 5 Ch. 577.
(4) Law Rep. 6 Q. B. 77.
(5) Ibid. 6 Ch. 70.
(6) 1 E. & B. 15.
(7) 4 H. & N. 1.

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[The LORDS JUSTICES:—In that case the declarations of the bankrupt were admitted as evidence of his intention. You cannot use them as evidence of the facts.]

We do not contend that the deed, if treated as executed by *Martin* alone, can be a good security for his private debts; but that is no reason why it should not be good as regards partnership debts.

Mr. *Little*, Q.C., and Mr. *Doria*, for the trustee:—

Both the Chief Judge and the County Court Judge held that *John* had committed an act of bankruptcy; but the latter thought that *Snowball* had no notice and that actual fraud must be proved. In this we submit he was in error: *In re Wood* (9). *Snowball* knew facts which amounted to notice, and the Court will not enter into the question whether he actually drew from them the inference which any reasonable man must have drawn. Unless the execution by *John* is good the property did not pass; for a deed by *Martin* alone would only pass his interest, *i.e.*, what was coming

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(1) Law Rep. 6 C. P. 107.
(2) 19 W. R. 1145; 24 L. T. (N.S.) 395.
(3) Law Rep. 2 Q. B. 634.
(4) 2nd Ed. p. 291.
(5) 5 M. & S. 336.
(6) 9 Ex. 145.
(7) 1 Mont. & A. 18.
(8) 9 Bing. 349.
(9) Law Rep. 7 Ch. 302.

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to him after the debts of the firm were paid. It was contended, that as a partner he could dispose of it; but a partner can only bind his co-partner by the law merchant and by some instrument coming within the scope of the partnership authority, which a deed does not: *Chitty* on Contracts (1); *Harrison* v. *Jackson* (2). Moreover, the deed is of such a nature as to be clearly beyond the powers of a partner. It therefore only could pass *Martin's* interest, the nature of which is shewn by *Dutton* v. *Morrison* (3). In *Bowker* v. *Burdekin* (4) an assignment by one partner, similar to the present, was held an act of bankruptcy. Then, as to the execution by *John.*

[The LORDS JUSTICES:—You need not address yourself to that; the power of attorney could not authorize a deed providing for separate debts of *Martin.*]

A substantial exception from the debtor's property is requisite to make the deed not an act of bankruptcy: *Ex parte Foxley, Re Nurse* (5). The Court cannot, as a jury, find that this was a *bonâ fide* arrangement to keep the business going: *Lindon* v. *Sharp* (6); *Ex parte Sparrow* (7); *Ex parte Bailey* (8); *Lacon* v. *Liffen* (9).

Mr. *De Gex,* in reply, on the question of the power of a partner to deal with the real estate, referred to *Story* on Partnership (10); *Thornton* v. *Dixon* (11); *Darby* v. *Darby* (12); *Balmain* v. *Shore* (13); *Juggeewundas* v. *Ramdas* (14); *Bank of England Case* (15).

May 30. The judgment of the Court was delivered by

SIR G. MELLISH, L.J., who, after stating the facts of the case, for the most part in the same terms as above, continued:—

We have now to determine whether the execution of the mortgage deed by either of the bankrupts was valid, and if the deed was a valid deed so far as regards its execution by one of the bankrupts, but was invalid as respects the other, what interest in the partnership property passed to Mr. *Snowball* under the deed?

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(1) Page 236.
(2) 7 T. R. 207.
(3) 17 Ves. 193.
(4) 11 M. & W. 128.
(5) Law Rep. 3 Ch. 515.
(6) 6 Man. & G. 895.
(7) 2 D. M. & G. 907.
(8) 3 D. M. & G. 534.
(9) 7 L. T. (N.S.) 775; 4 Giff. 75.
(10) Sects. 92, 93, 94.
(11) 3 Bro. C. C. 199.
(12) 3 Drew. 495. 2 Jur. N.S. 271
(13) 9 Ves. 500.
(14) 2 Moo. Ind. App. 487.
(15) 3 D. F. & J. 645. 7 Jur. N.S. 668
(9 L.C. 9 Jur. N.S. 13; 4 L.T. 771

The County Court Judge held that the execution of the deed by Mr. *Moore* on behalf of *John Douglas* under the power of attorney was invalid, upon the ground that the power of attorney was confined to *John Douglas's* private affairs, and did not extend to partnership matters; and we entirely concur in that opinion. It was argued before us that the power of attorney gave express power to sell the ship, and that the ship was proved by the accounts to be partnership property, and that therefore the power of attorney ought to be held to extend generally to partnership matters. The power of attorney, however, refers to the ship as if it was the private property of *John*, and there was reason for this, because the ship had been previously mortgaged to *Thompson* by *John* in his own name; and we do not think that, because the power of attorney gives *Moore* express power to sell the ship, therefore it ought to be construed in other respects to extend to partnership affairs. The Chief Judge held that the power of attorney was rendered invalid by the act of bankruptcy committed by *John Douglas* in quitting the kingdom, and that therefore the mortgage deed was never executed by *John Douglas*. We agree that the execution of the mortgage deed by Mr. *Moore* on behalf of *John Douglas* was invalid on this ground, and if Mr. *Snowball*, at the time the deed was executed, had notice that *John Douglas* had committed an act of bankruptcy, a question we shall subsequently have to consider with reference to the validity of the bill of sale of the ship, the execution would be invalid on that ground also.

The next question to be determined is, was the execution of the deed by *Martin Douglas* an act of bankruptcy? The County Court Judge held that the advance of £160 by Mr. *Snowball* to *Martin Douglas* between the 20th of October and the 17th of November, to enable him to pay wages, on the express promise that he should have a security on the ropery and should be paid out of the proceeds of the ship when sold; the sum of £400 paid to the *Northern Counties Loan and Discount Company*, who had threatened to enter upon and sell the ropery; the £420 paid for the purchase of the ship, with all the sails, ropes, timber, materials, and other things prepared for her completion; and £184, the arrears due to the building society, which had threatened to declare the shares forfeited, making together £1064, were a present equivalent for the transfer of the property, and, according to the later decisions on the subject, prevented the execution of the deed by *Martin Douglas* being an act of bankruptcy. The Chief Judge did not think it was made out that any sum had been advanced by Mr. *Snowball* upon a promise that he should have a security on the ropery, and appears to have treated the other sums as sums voluntarily paid by Mr. *Snowball* for protecting his own security, and not as present advances made for the benefit of the bankrupts; and he also points out that the deed is one by which *Martin Douglas* professes to pledge, not only the partnership property for an antecedent debt, but engages the partnership property for the payment of any separate debt of his own then due, or any debt which may become due afterwards.

Upon consideration we are of opinion that the circumstance of the deed professing to pledge partnership property for the present and future separate debts of *Martin Douglas* and *John Douglas* makes the execution of the deed on the part of *Martin Douglas* an act of bankruptcy. It is clear that at the time he executed the deed *Martin Douglas* knew that both the firm and himself personally were insolvent. The firm owed £5000 to general creditors in addition to the £4000 they owed Mr. *Snowball*, and after the execution of the deed they had not at the utmost more than £600 or £700 of assets to pay their debts. *Martin Douglas* had the same day by bill of sale transferred his household furniture to another son, and after that had no personal property left. We are also of opinion that *Martin Douglas* must be treated as having had notice that his son and partner *John Douglas* had committed an act of bankruptcy. He knew all the circumstances under which *John* had left the country and was remaining abroad.

We are of opinion that it is a fraud upon the creditors of a partnership for a partner who knows that his firm is insolvent to transfer partnership assets to a creditor of his own, or to give a security over the partnership assets for his own private debt, or for future advances to be made to himself. Such a transfer necessarily tends to defeat the creditors of the partnership, and to prevent the

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proper distribution of the assets under the bankrupt law. It was admitted in the argument before us that the deed would not give Mr. *Snowball* a valid security on the partnership property for private debts owing to him by *Martin Douglas;* but it was contended that the deed might notwithstanding be valid, so far as it gave a security for partnership debts. We do not see how, upon a question whether the execution of a particular deed is an act of bankruptcy, one part of the deed can be separated from the rest. If by any part of a deed authority is given to apply partnership property transferred by the deed to purposes which are a fraud upon the creditors of the partnership, we think the execution of the deed makes a fraudulent transfer of property, and is therefore an act of bankruptcy. We may also observe that if *John Douglas* had executed the deed the partnership property would plainly have been transferred as a security for the several debts of the partners unless they were held to have committed acts of bankruptcy; and the case of *Bowker* v. *Burdekin* (1) is a direct authority that where a deed to which all the partners in a firm are made parties would operate if executed by all as a fraudulent transfer of partnership property, each party commits an act of bankruptcy at the time he executes the deed, unless he executes the deed as an escrow.

Martin Douglas, by executing the deed, did all that could be done on his part to make the partnership property a security for the several debts of himself and his son *John;* and as this would necessarily tend, if carried out, to deprive the creditors of the partnership of their just rights to have the partnership property applied in payment of the partnership debts, we think he must be held thereby to have committed an act of bankruptcy.

We therefore are of opinion that the mortgage deed did not, as against the creditors, validly transfer any part of the partnership property professed to be assured by it to Mr. *Snowball*, and this makes it unnecessary for us to consider what would have been the legal effect of the deed if the execution of it by *Martin Douglas* had not been an act of bankruptcy.

The remaining question to be considered is, whether the bill of sale of the ship was valid. The County Court Judge held that

(1) 11 M. & W. 128.

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the power of attorney authorized Mr. *Moore* to effect a sale of the ship, and as he came to the conclusion that Mr. *Snowball* had not notice that *John Douglas* had committed an act of bankruptcy, he held the sale of the ship valid. The Chief Judge held that the power of attorney was revoked by the act of bankruptcy committed by *John*, and that therefore the bill of sale of the ship was not validly executed on behalf of *John Douglas.* In the report of his judgment laid before us it is not in terms stated whether he thought that Mr. *Snowball* had notice of the act of bankruptcy committed by *John*, though we have little doubt, from the general tenor of his judgment, that he would have held, if he had thought it necessary, that he had such notice. We are of opinion that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still if after the act of bankruptcy but before the adjudication property is conveyed under the power to a *bonâ fide* purchaser, who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee. It is obvious that a power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself; and wherever a sale would be binding on a bankrupt, if no adjudication follows it is binding on the trustee under a subsequent adjudication if the purchaser had no notice of an act of bankruptcy having been committed by the seller at the time of the sale.

It appears to us, therefore, necessary to consider whether Mr. *Snowball* had on the 17th of November, 1869, notice that *John Douglas* had committed an act of bankruptcy. The facts and evidence material to this question are, we think, correctly stated by the County Court Judge in his judgment:—[His Lordship here read the passages which are given above from the judgment of the County Court Judge.] Now it is clear from the language of the learned County Court Judge, that he thought—and in this respect we agree with him—that Mr. *Snowball* knew facts which were in themselves sufficient to lead his mind to the conclusion that *John Douglas* had left *England* with intent to defeat and delay his

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creditors, and had therefore committed an act of bankruptcy; but because Mr. *Snowball* states in his affidavit that he did not in fact draw the inference that *John Douglas* intended to defeat and delay his creditors the County Court Judge thought himself bound to find that Mr. *Snowball* had not notice of an act of bankruptcy. We cannot agree that this was a proper mode of deciding the question. It appears to us that if a person is proved to know facts which constitute an act of bankruptcy, or is proved to know facts from which a Court or a jury, or any impartial person, would naturally and properly infer that an act of bankruptcy had been committed, he ought to be held to have had notice that an act of bankruptcy had been committed, and that the Court ought not to enter upon the inquiry whether he did in his own mind believe that an act of bankruptcy had been committed, or whether he did in his own mind draw the inference that the bankrupt intended to defeat and delay his creditors. A person may be proved to have had notice that an act of bankruptcy had been committed, either by proof that he had received formal notice that an act of bankruptcy had been committed, or by proof that he knew facts which were sufficient to inform him that an act of bankruptcy had been committed. If he is proved to have received a formal notice he is not allowed to escape from the effect of having had notice by saying he had not read it when he ought to have read it, or that he did not believe it when he had read it; and we think if he is proved to have known facts which were sufficient to have informed him that an act of bankruptcy had been committed, he cannot be allowed to escape from the effect of having had notice by saying he did not draw the natural inference from the facts. We are therefore of opinion that Mr. *Snowball* had on the 17th of November notice that *John Douglas* had committed an act of bankruptcy, and that therefore the sale of the ship was invalid.

The result is, that the judgment of the Chief Judge was, in our opinion, correct on all points, and that the appeal must be dismissed with costs.

Solicitors: Messrs. *Torr, Janeway, & Co.*; Messrs. *Bell, Brodrick, & Gray.*

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1872
May 27, 28;
June 5.

4 A&E. 67.
98
8 Ch. 868.
19 Eq 76
5 Ch D. 609

LARIVIÈRE *v.* MORGAN.

[1871 L. 33.]

Foreign Government—Enforcing Contract—Deposit in this Country—Payment—Certificates refused.

Where a foreign government has made a contract in this country, and has lodged money in the hands of agents in this country for payment of the sums to become due under the contract, the Court will not refuse relief to the contractor because the contract was with a foreign government, nor because the foreign government does not appear before the Court.

Where goods are to be paid for when received, and money is lodged for payment on the production of certificates from an agent of the purchaser, the Court, if certificates are refused, may direct an inquiry and order payment of what is due to the contractor who has supplied the goods.

The French Government contracted in *England* for the purchase of a large number of cartridges, which were to be inspected, and when accepted were to be paid for through the French ambassador; and bankers in *England*, who had in their hands funds belonging to the French Government, wrote to the contractor in *England* that a special credit for £40,000 had been opened in his favour, and would be paid to him upon receipt of certificates from the French ambassador. Some cartridges were supplied and paid for, and others were delivered to agents for the French Government; but other agents of the French Government alleged that the time for the delivery had expired. Certificates were refused, and the bankers refused to make any further payments. The contractor thereupon filed his bill against the bankers and the French Government, praying to have the balance of the £40,000 brought into Court, and for an inquiry and payment. The French Government did not appear. The bankers were ordered to bring the money into Court; and the contractor was declared to be entitled to payment for all cartridges delivered under the contract; and inquiries what cartridges had been delivered were directed.

Decree of *Malins*, V.C., affirmed, with variations.

Affirmed by H of L LR 7 HL 423.

M. A. LARIVIÈRE, the Plaintiff in this case, and one *E. B. des Minières*, in November, 1870, entered into a contract with *Leon Gambetta*, who was then acting as Minister of War for the Committee or Government of the National Defence in *France*, and the other members of that Committee or Government, acting by M. *Joulin*, their agent in this country. This contract was dated the 30th of November, 1870, and was signed by the Minister of War and M. *Joulin*, and was, as translated, in the words following:—

"War Department.

"Contract with Messrs. *Bellot des Minières* and *Larivière* to supply ball cartridges for rifles, model 1866.

See also Carnot v Morgan LR 1 Ch Div 2

"Between the undersigned, M. *Bellot des Minières* and M. *Larivière,* both of whom reside in *London,* and the Minister of War, represented by M. *Joulin,* his delegate in *London,* the following agreement has been made:—

"Messrs. *Bellot des Minières* and *Larivière* engage themselves to supply the French Government 20,000,000 ball cartridges for rifles according to model 1866, at the rate of 150 francs per 1000.

"The delivery will take place in *London,* in lots of 25,000 or more, in cases or barrels of uniform model, containing about 3000 each.

"These cases or barrels will bear particular and distinct marks indicating their contents and the model of the cartridge.

"Out of the 20,000,000 cartridges to supply, 7,000,000 must be delivered before the 5th of December, and the remainder before the 10th of January, 1871; and time will be considered the essence of the contract.

"The cartridges will contain five grammes (French weight) of fine English musket powder, and will be tried in *London* by a French delegate charged with this office, who will deliver a certificate stating that the cartridges are efficient for war service, and serviceable for the rifles of the model 1866.

"Experiments will be made by trying fifty cartridges taken out of the bulk of each lot, and must not contain more than 5% rejected.

"Any lot containing a greater percentage of rejected cartridges will not be accepted.

"The lots will, immediately after having been duly accepted on the responsibility of the delegate of the Minister of War in *London,* be paid for through the care of the French ambassador, who will issue cheques for the amount.

"The contractors cannot claim acceptance of any of the merchandise after the 10th of January, 1871, and cannot claim any indemnity for goods supplied after the hereinbefore stipulated time."

In consequence of the war and the difficulties of communication the Plaintiff, as he alleged, before incurring the responsibility of buying materials, &c., required the delegates of the Committee of National Defence to deposit in the hands of the Defendants *Morgan & Gooch* a sum of £40,000. Messrs. *Morgan & Gooch* were bankers in *London*, and, as financial agents for the then French Government, had lately raised a loan of £10,000,000, in respect of which they had large sums of money in their hands, and by the direction of M. *Joulin*, who, under the orders of the then French Government, had a large credit with them, they wrote to *Larivière* and *Des Minières* a letter, dated the 1st of December, 1870, as follows:—

> "Gentlemen,—We are instructed by Mr. *L. Joulin* to advise you that a special credit for the sum of £40,000 (say forty thousand pounds), equivalent to frs.1,000,000 (one million francs), has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered upon receipt of certificates of reception issued by the French ambassador or by Mr. *L. Joulin.*
>
> "We shall require receipts in duplicate for the payment or payments as made, and the surrender of this letter on the final payment under it being made."

Des Minières afterwards withdrew from the contract, and *Larivière* alone proceeded with it, bought materials, and employed people to make cartridges. He supplied 70,000 cartridges, which were accepted by the agents for the French Government, and duly paid for by *Morgan & Gooch*. M. *Joulin* afterwards gave directions for alterations to be made in the manufacture, and promised, as *Larivière* alleged, to obtain a prolongation of the time, and the Plaintiff alleged that in consequence of these alterations he was prevented from delivering the rest of the cartridges by the 10th of January, 1871.

On the 13th of January, 1871, Messrs. *Morgan & Gooch* sent a letter to *Des Minières* and *Larivière*, as follows:—

> "Mr. *Joulin* now informs us that, as the time has already expired within which the deliveries of goods were to be made, and to pay for which this credit was opened, no further deliveries can be made under it, and we are not to make any further payments in virtue of it.
>
> "Under these circumstances, in accordance with his instructions, we request that you will return us our letter dated the 1st ultimo, and take note that the credit advised therein is withdrawn and cancelled."

Some cases of cartridges had, however, been duly inspected and accepted by the officers of the French Government on the 10th of January, and others were inspected after the 13th of January, but the officers afterwards refused to inspect or accept any more cartridges. The agents had, moreover, refused to grant certificates for those which had been accepted.

M. *Larivière*, therefore, being unable to obtain payment for these cartridges, in February, 1871, filed a bill against *Morgan*, *Gooch*, *Des Minières*, and the nine persons who had, in November, 1870, formed the Committee or Government of the National Defence, which bill was afterwards amended by striking out the nine members of the Government as Defendants, and making the French Republic a Defendant.

The bill as amended stated as above mentioned, and alleged that the Government was, in January, 1871, engaged in negotiating terms of peace, and accordingly its officers and agents, vexatiously and contrary to good faith, refused to grant proper certificates as to the cartridges; that the Plaintiff had 2,000,000 of cartridges on hand, and had been obliged to dispose of plant and materials at a ruinous loss. And the bill prayed a declaration that *Morgan & Gooch* held the residue of the £40,000 upon trust to pay to the Plaintiff the sums due to him under the contract, and as a security to him for the payment of these sums, and prayed for inquiries and accounts, and for an injunction to restrain *Morgan & Gooch* from parting with the residue of the £40,000.

Morgan & Gooch, by their answer, said that they had had large sums of money in their hands, which they held pursuant to the orders of the French Government of National Defence, and when directed by that Government to open a credit with any person, they did so accordingly; but from time to time, under the direction of that Government, they carried the balance standing to any particular credit back to the general account of the French Government. No separate credit was opened in their books with respect to this particular contract, but a note was made on M. *Joulin's* account; and in pursuance of proper certificates as to the cartridges, they had paid £5,313. They professed ignorance as to most of the matters in question in the suit, and stated that the Government of the National Defence had long ceased to exist,

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and that the moneys in question were now the property of the French Republic.

Some evidence was entered into by the Plaintiff which, as appears from the judgments of the Vice-Chancellor *Malins* and the Lord Chancellor, was not sufficient to shew what he was entitled to be paid. The Defendants *Morgan & Gooch* did not enter into any evidence, and the French Republic did not appear.

The suit came on to be heard before the Vice-Chancellor *Malins*, who directed that the French Government should be respectfully invited to appear and contest the matter.(a) The French ambassador, however, took no notice of the invitation, and the suit came on to be heard in the absence of the French Government.

The Vice-Chancellor made a declaration that the Plaintiff was entitled to be paid out of the £40,000, and that the time had been waived by the French Government; and he directed inquiries accordingly, and ordered the balance of the £40,000 to be brought into Court (1).

(a) See WN(1872) 42.

(1) 1872. March 5.

SIR R. MALINS, V.C.:— WN(1872) 60

His Honour stated the facts of the case, and said that it was clear that the Plaintiff had required this separate account to be opened, and that without it he would not have entered into the contract. It was true that the Plaintiff was entitled to payment out of this account only on the production of the proper certificates by M. *Joulin*, or by some other agent, but it did not follow that because M. *Joulin* refused to give any certificate *Morgan & Gooch* were to be at liberty to repudiate the rights of the Plaintiff. Could it be contended that the French Government were at liberty to induce the Plaintiff to enter into this contract on the faith of this deposit, and the very next day to require *Morgan & Gooch* to re-transfer the deposit? Of course no foreign government could be sued in this Court, as was clearly laid down in *Wadsworth* v. *Queen of Spain* (17 Q.B. 171), nor could the agents of a foreign government be sued: *Gladstone* v. *Ottoman Bank* (1 H. & M. 505); and if there had been no deposit, no bill like this for the execution of a contract could have been maintained. But here it was the very object of the Plaintiff to have a deposit in this country as a security.

Then *Morgan & Gooch* said that the contract had not been performed, and in this there was the difficulty that the French Government did not appear, though they had been most respectfully invited to submit the question to the Court. Still *Morgan & Gooch* had engaged to hold this money for the benefit of the Plaintiff if he performed the contract, and until it was ascertained that he had not done so, they could not be at liberty to hand the money back to their principals. They must be considered as stakeholders, and as bound to bring the money into Court, to abide the decision of the Court as to whether the contract was or was not performed.

Although the French Government

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The Defendants *Morgan & Gooch* appealed.

Mr. *Pearson*, Q.C., and Mr. *C. Hall*, for the Appellants:—

If this money had been set apart, and made a separate credit for the Plaintiff, the case might be different; but it was merely a special credit on certain conditions. If the Plaintiff had the certificates, perhaps *Morgan & Gooch* would have been liable; but he asks the Court to decide whether the certificates ought not to have been given, that is, to enforce a contract against a foreign government; and this the Court cannot do. It is true that *Morgan & Gooch* are before the Court, but to order them to pay would be merely to do that in an indirect manner which the Court could not do directly. We have always held these moneys entirely at

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had not appeared, and although Messrs. *Morgan & Gooch* had entered into no evidence beyond their answer, still they had appeared and had argued the case, not as stakeholders, but really on behalf of the French Government. A decree must be made for an inquiry whether the Plaintiff had performed the contract, and as to what was due to him under it; and the French Government must be invited to appear on the inquiry; and if the French Government did not appear, the inquiry must go on in their absence.

On the question of law whether, when a British subject had contracted with a foreign government to deliver goods, and had required the security of a deposit, the foreign government could keep the goods and withdraw the deposit, *Gladstone* v. *Musurus Bey* (1 H. & M. 495)(a) was an authority; and though the order was there made upon an interlocutory application only, it followed that a similar order would be made at the hearing; and, as was said in that case, although the Court cannot proceed against an ambassador, it has jurisdiction over the fund. So, if a foreign government contracted a loan in this country, and as a security for payment of interest, deposited a certain sum of money in the hands of bankers here, it was clear that the foreign government, having obtained the loan, would not be allowed immediately to withdraw the fund so deposited.

No doubt *Morgan & Gooch* were not bound to pay the Plaintiff without the certificates, but it did not therefore follow that the fund was not liable to the Plaintiff, for the question in this case was whether he had performed his contract. In *Scott* v. *Liverpool Corporation* (28 L. J. (Ch.) 230; 5 Jur. N. S. 105), where the production of the certificates by the engineer was a condition precedent to the payment, and the engineer, without any fraud, refused to give the certificates, the Court refused to decree payment. But where there was fraud, payment had been decreed. Here the evidence of the Plaintiff was that the agents of the French Government had acted unfairly and oppressively, for of course any government might have unfair and dishonest agents; and if it should be made out that the agents had so acted, and that the certificates ought to have been given, then the Plaintiff was entitled to the relief he asked.

(a) S C 9 Jur N.S. 71.

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the disposition of the French Government, and the Court cannot, in the absence of that Government, decide what directions that Government ought to give: *Wadsworth* v. *Queen of Spain* (1); *Gladstone* v. *Musurus Bey* (2); *Gladstone* v. *Ottoman Bank* (3); *Smith* v. *Weguelin* (4). How can the inquiry be prosecuted in the absence of the Government which is solely interested in the matter? The agreement was that the money should be paid on the production of the certificates, and the Court can neither order payment without the certificates, nor compel the French Government to give them. If *Morgan & Gooch* pay this money without certificates, what answer will they have when their principals claim the money? No doubt, in some such cases, where the certificates have been fraudulently or wrongfully withheld, the Court has tried to do justice, and has dispensed with them, but the Court cannot hold that a foreign government has acted fraudulently or wrongfully. If the Plaintiff has any claim, he can enforce it in *France.* The form of the decree shews the impossibility of granting what is asked, for the decree does not order payment, but merely directs an inquiry whether anything is due.

Mr. *Glasse,* Q.C., and Mr. *Davey,* for the Plaintiff:—

We admit that without further evidence a decree cannot be made; but there is evidence enough for an inquiry. As to the separate credit, we have nothing to do with the way in which *Morgan & Gooch* keep their books, and if they did not carry this £40,000 to a separate account, they ought to have done so. If, under similar circumstances, the principals had become bankrupts, would this money have remained in their order and disposition? It is true that the party liable is a foreign government, who cannot be compelled to appear; but the money is in this country, and the simple question is whether the bankers who hold it are not liable to the Plaintiff. When a foreign government puts money into the hands of its agents in this country, it must know that the money will be subject to the laws of this country; in fact that was the object of the Plaintiff in requiring the money to be

(1) 17 Q. B. 171.
(2) 1 H. & M. 495. 9 Jur. N.S. 171
(3) 1 H. & M. 505. 9 Jur. N.S. 556
(4) Law Rep. 8 Eq. 198.

deposited here. In the case of the *Prince Frederick* (1) there was no such contract. There is no difference between this case and that of an ordinary Defendant who is out of the jurisdiction, which has never been held to prevent the Court from doing justice as far as it can. The French Government can come in and make such defence as is possible, but the Plaintiff must not be injured because the French Government does not choose to do so. Even if they do not, it is perfectly competent to *Morgan & Gooch* to shew on the inquiry that nothing is due to the Plaintiff. There is, no doubt, a difficulty as to the form of the decree, inasmuch as the Court cannot at present make any declaration of rights; but that has been occasioned entirely by the absence of the French Government. We want a declaration that the Defendants are stakeholders, and then we have the inquiry. We shall claim for the cartridges delivered, and for those inspected and approved, and for those properly tendered for inspection. It will be open to the Defendants to shew that we are entitled to nothing. As to damages for waste of machines and material, we admit that there is a difficulty.

Mr. *Pearson*, in reply:—

The Plaintiff cannot claim for cartridges which were inspected by inspectors scattered over the country, and ignorant of what had taken place. We say that there was a breach of contract by the Plaintiff, and that the French Government had a right to put an end to the contract. The only foundation for the bill is want of good faith on the part of the French Government; and of that there is no evidence whatever. The Plaintiff does not even pretend that *Morgan & Gooch* are guilty of collusion. It is clear that the Plaintiff could not recover at law, as he has not the certificates, and then he asks to have the money brought into Court, in order to obtain an equity. He did not bargain for anything of the kind; all he wanted was to know that there was money to pay him with. But that money was to be dealt with according to the agreement, and the French Government were to have a right to refuse the certificates if they disapproved of the cartridges. That was all that the Plaintiff bargained for, and for the Court to decide whether he ought to have the certificates is giving him much more.

(1) Cited in *De Haber* v. *Queen of Portugal*, 17 Q. B. 212.

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In *Central Railroad and Banking Company of Georgia* v. *Mitchell* (1) the money was sent here for distribution. In *Stevenson* v. *Anderson* (2) the bill was filed by the stakeholder himself. Here the party liable is a foreign government, against which the Court has not the same jurisdiction as it has against a subject of this country.

June 5. LORD HATHERLEY, L.C., after stating the facts of the case, and that the contractors were desirous of having some assurance that in the then troubled state of *France* they should not be obliged to have recourse to that country for payment, continued:—

Now no one can suppose that after the letter of the 1st of December had been written it was to be at the option of the French Government to retire from that agreement, and that Messrs. *Morgan & Gooch* could, upon an order from the French Government, transfer that sum of money to some other account. It appears to me that, in other words, there was a plain and clear trust impressed on this fund, under which those who had the benefit of the trust would be entitled, if they performed their contract, to receive the money.

Of course the goods were to be delivered according to the contract, and in accordance with all the conditions of the contract, including the condition of time, unless that condition had been waived. But the evidence of the fulfilment of those conditions which would justify Messrs. *Morgan & Gooch* in making payment was to be the certificate of the French ambassador or of M. *Joulin*, who had been the agent of the French Government, and under whose control the general funds of the French Government stood with Messrs. *Morgan & Gooch*. And though Messrs. *Morgan & Gooch* would be perfectly justified in declining to make any payment except upon the evidence which they were told to accept, that does not affect the question whether the absence of the certificate of reception can have such an effect as, at the option of the French ambassador or M. *Joulin*, to deprive the contractors of the benefit of the engagement which had been entered into with them.

This is not like one of those cases in which goods are to be

(1) 2 H. & M. 452. 11 Jur NS 358

(2) 2 V. & B. 407–411.

tested by an engineer and paid for upon his certificate, which certificate he refuses to sign. In those cases the parties have chosen their own judge as to the proper fulfilment of the contract, and if the engineer declines to certify, the Courts have held that, in the absence of all fraud on his part, the certificate is a *sine quâ non*, and that accordingly the contractor, having submitted to that condition, must abide by it if the goods are not such as the engineer will certify for. But here neither the ambassador nor M. *Joulin* are to try the cartridges, about which they would know nothing; although they would know whether the cartridges, when tried and approved, had or had not been received by the French Government. If, therefore, the French Government receive the cartridges, it is then to be taken that the proper certificate has been given.

It is not required that this certificate shall be a condition preliminary to payment. The condition for payment is, that the goods shall be delivered and received. Supposing that the ambassador were changed, or that some one was appointed in the place of M. *Joulin*, then I apprehend that the Court would say that payment cannot depend upon any special quality in the ambassador or in M. *Joulin*, the real agreement being that, upon the goods being delivered according to the contract, the payment shall be made out of that specific fund.

The main argument in the case has, however, been that the French Government, though it has an undoubted interest in the fund, is not before the Court; and that even if the whole contract had been fulfilled to the day, the French Government is still entitled to the balance which will remain, and is therefore entitled to see that the payments have been properly made. But it is clear, upon the authorities, that the Plaintiff cannot compel them to come here and submit to the jurisdiction of this country. They may appear as has been done in other cases. The *United States* have filed bills in this country and have submitted to the jurisdiction, and thereupon have had their rights ascertained. But the question now raised is, whether, in the absence of the French Government, it is possible to ascertain the rights to this particular fund, the French Government declining to appear—a very proper course to take if they think fit.

Is there, then, to be a total failure of justice because the French

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Government declines to assert any right to the fund? Messrs. *Morgan & Gooch* say reasonably enough that they knew nothing about the rights, and cannot undertake to determine them. They also say—not so reasonably—"let the fund remain until the French Government comes in, or allow us to re-transfer it, because the rights between these parties cannot be determined." In answer to this, I will put the case of a foreign government having placed in this country a sum of money, and having charged it with certain trusts to be performed, subject to which the balance is to be paid back to the foreign government—Is it possible to say that in such a case the trustee is not liable to perform the trust because the foreign government, one of the *cestuis que trust*, cannot be made to appear? There is great analogy between this case and the case of an interpleader suit. In *Stevenson* v. *Anderson* (1), a banker having a fund claimed by several persons, all but one of whom were out of the jurisdiction, paid it into Court by way of interpleader, and then served all the parties out of the jurisdiction. In that case Lord *Eldon* said the fund could not remain here for ever, and that it would be paid out to the only person who did appear and submitted his claim.

5Ch D 610

In any such case we must ascertain as we best can, in the absence of the other parties, what are the rights of the parties who do appear. In the case of *Wylie* v. *Wylie* (2), in which a large sum of money was left by will to the Russian Government, administration was taken out on behalf of the Russian Government, and litigation ensued; but there the Russian Government appeared, and the difficulty did not arise. There may be many cases in which a foreign government has some interest, but the other parties interested must not suffer because it is impossible to compel the attendance of one of those who might claim the fund.

Messrs. *Morgan & Gooch*, however, say that they will be liable to the consequences of any proceeding that may be instituted in *France* by the French Government, who might say that the fund was not to be handed over except upon the certificate of the ambassador. But I apprehend that the comity of nations would extend to such a case, and that the decision of this Court will be respected, as we should respect a decision of a Court in *France* with reference to

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(1) 2 V. & B. 407.

(2) 6 Jur. (N.S.) 259; 29 L. J. (Ch.) 341.

1 DG F+J 410

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any fund which was clearly within the jurisdiction of that Court, and which had to be dealt with upon facts which had taken place in that country. Moreover I apprehend that neither in that Court nor in any Court in any civilized country would it be held that where the certificate of a French ambassador is required a person would lose his money because, for instance, there happened to be no ambassador.

I stand, however, upon higher ground, for I assume that the Courts of all countries would recognise the decision of a Court of competent jurisdiction in a country where the property was situated, and where the rights were properly to be tried.

It appears to me, therefore, that there is no difficulty in the way of the Plaintiff if the contract has been performed. As regards that part of the case, and as to the inquiry, I am very much of the same opinion as the Vice-Chancellor. I feel myself, however, bound to differ from him as to the effect of the evidence, as shewing that the condition of time being of the essence of the contract has been altogether waived, and in that respect the decree must be varied.

Minutes:—Declare that under the contract and letter, &c., the Plaintiff became entitled to be paid rateably for all cartridges supplied to and received by the French Government under the contract, &c., out of the sum of £40,000, &c.

Declare that the first limit of time, namely, the 5th of December, 1870, was waived.

Inquire whether the second limit of time, namely, the 10th of January, 1871, was waived or extended, &c.

Inquire what number of cartridges were delivered or tendered by the Plaintiff to the French Government, and at what dates, and whether any and which of them were received by the French Government, and whether any and which were rejected, and whether or not having been tested by agents of the French Government. Costs to be costs in the cause.

Adjourn further consideration. Liberty to apply.

Solicitors for the Plaintiff: Messrs. *Innes & Son.*

Solicitor for Messrs. *Morgan & Gooch:* Mr. *Clements.*

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May 28, 29; June 5.

CRAMPTON *v.* VARNA RAILWAY COMPANY.

[1871 C. 233.]

Corporation—Agreement not under Seal—Money demand—Part Performance—Building on the Land of another.

8QBD581

The agent of a railway company made a verbal agreement with the contractor for the line, that if he would build on land of the company certain cottages more substantially than would be required for his own purposes, and would leave them for the use of the company, then the company would pay him £5000. The cottages were accordingly built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid £500 a year for the cottages by way of rent, with an option to the company to purchase them for £5000. This agreement was confirmed by a resolution of the board of directors. The company paid the £500 a year for some years, and then refused to pay:—

Held, that the claim of the contractor being simply for payment of money could not be enforced in the Court of Chancery; and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money:

Held, also, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation for having been induced to build on the land of the company.

Order of the Master of the Rolls affirmed.

THE bill in this case was filed by *T. H. Crampton*, claiming under Messrs. *Peto, Betts, & Crampton*, against the *Varna Railway Company*, and stated as follows: That the company was formed in the year 1863 for the purpose of making a railway in *Turkey*. That the company had always been a company carrying on business in *England*, and was a body corporate having a common seal. That the company was governed by certain statutes, which provided (amongst other things) that the seat of the company should be at *Varna:* that the affairs of the company should be managed by a council of administration in *London:* that the council should be invested with the fullest powers for the administration of the affairs of the company, and should enter into all agreements as to the purchase, sale, taking on lease, or letting any railway, lands, warehouses, or other buildings coming within the objects of the company, and should make agreements relating to the interests or affairs of the company generally: that the company should have a common seal, and that all contracts and agreements purporting to be made by the company involving sums of more than £500 should have the common seal affixed thereto, together with the signatures of at least two members of the council and the secretary. That Messrs. *Peto & Co.* contracted for the construction of the railway by contracts under the seal of the company, one of the terms of which was that the company would at their own cost acquire all the land necessary for the railway and works, but that the contractors would at their own expense provide huts and dwellings for the workmen. That Mr. *McCandlish* (as engineer for the company) arranged with Mr. *Barkley* (as agent for the contractors) that, inasmuch as cottages were indispensable for the company for working the railway when opened, instead of the contractors setting up mere temporary huts for the use of their workmen during the construction of the works, they should build permanent and substantial cottages, which might, upon the completion of the railway, be retained and used as dwellings for the company's servants and officials. That *McCandlish* had full authority on the part of the company to enter into such arrangement, and that such arrangement was communicated to the directors, and they were fully aware thereof, and acquiesced in and approved of the same as being an arrangement very beneficial for the company. That, accordingly, substantial cottages and a house and stable were built by the contractors, under the superintendence and to the satisfaction of *McCandlish*, and with the acquiescence and approval of the directors, on land which had been acquired by the company for the purposes of the undertaking. That no definite sum was fixed as the price for such cottages, house, and stable, but there was an understanding during the time that the works were progressing that such price was to be £5000, which was, in fact, a fair price for the same. That *Barkley* wrote to *McCandlish* a letter stating that the cottages would not be handed over to the directors as part of the works, and that £550 would be a fair rent for them. That when the railway was nearly completed, some correspondence took place respecting the cottages, and on the 27th of October, 1866, *McCandlish* wrote to the directors a letter stating that he considered the rents at which the cottages might be rented from the contractors to amount to £500. That at a meeting of the directors on the 1st of November a resolution was passed that the recommendation contained in *McCandlish's* letter should be accepted, subject however to the company having the option of purchasing the cottages for the sum of £5000 on the general settlement with the contractors; and a copy of this resolution was sent by the secretary of the company to the agent of Messrs. *Peto & Co.* That the company agreed, instead of paying the £5000 for the cottages, to pay £500 a year, and the contractors agreed to this arrangement. That a letter was, on the 9th of May, 1867, written by the secretary of the company, under the order of the directors, to Messrs. *Peto & Co.*, stating that it had been arranged at *Varna* that the cottages should be rented by the company at £500 per annum. That in pursuance of this arrangement the cottages were not removed by the contractors, Messrs. *Peto & Co.*, and were left in possession of the company. That but for this arrangement they would have been removed. That the rights of Messrs. *Peto & Co.* became vested in the Plaintiff, who, in September, 1867, applied to the company for the rent. That the secretary of the company informed the Plaintiff that it was inconvenient to pay cash, and the company gave their acceptance for £525, payable at three months. That this acceptance was from time to time renewed. That in January, 1869, the secretary of the company sent to the Plaintiff a cheque for £500 on account of rent of the cottages, and on the 3rd of March, 1870, the Plaintiff received from the company £1072 in settlement of his claims for rent. That on the 15th of March, 1870, the secretary of the company wrote to the Plaintiff stating that the company could no longer undertake the collection of his rents. That the company now allege that in consequence of a requisition from the Turkish Government as to the accounts, they cannot recognise the Plaintiff's claim to the yearly sum of £500 in respect of the cottages. That the company had agreed with Messrs. *Peto & Co.* that if they allowed the cottages to remain, the company would pay the yearly sum of £500 in respect of the cottages (determinable on payment by the company of the gross sum of £5000). That the Plaintiff was advised that, inasmuch as the agreement with respect to the cottages was not under seal, and as the company claimed the legal estate in the soil on which the cottages stood, he had no remedy except in this Court. And the bill prayed that the company might be decreed to perform specifically their agreement to pay the Plaintiff the yearly sum of £500 in respect of the cottages until payment of the gross sum of £5000 in respect thereof, and that for this purpose the company might be decreed to execute all necessary instruments, and to pay to the Plaintiff such damages as the Court might think fit; that an account might be taken of what was due to the Plaintiff for arrears, or that the company might be ordered to pay damages in lieu of specific performance; and that the Plaintiff might be declared to have a lien on all moneys belonging to the company which were remitted to *England*.

To this bill the company demurred, and the Master of the Rolls allowed the demurrer.

The Plaintiff appealed.

Mr. *Southgate*, Q.C., and Mr. *Kingdon*, for the Appellant:—

The ground on which this demurrer was allowed is, that the agreement with *Peto & Co.* was not under the seal of the company; but in many cases that objection has not been allowed to impede the Court in doing justice: *Wilson* v. *West Hartlepool Railway Company* (1); *Laird* v. *Birkenhead Railway Company* (2); *Crook* v. *Corporation of Seaford* (3).

The Plaintiff has also an equity on the ground that the Defendants encouraged *Peto & Co.* to build on their land: *Earl of Oxford's Case* (4); *Master, &c., of Clare Hall* v. *Harding* (5).

It is necessary to come into this Court on account of the want of a seal; but the Plaintiff does not set up a mere money demand; he asks for specific performance and for rent to be paid: *Withy* v. *Cottle* (6). The company has had the benefit of the cottages, and cannot now turn round and defy the Plaintiff.

Mr. *Fry*, Q.C., and Mr. *Davey*, for the Defendants:—

There is no specific allegation of what the Plaintiff really conceives his claim to be. No doubt *Peto & Co.* had a right to the

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(1) 2 D. J. & S. 475; 11 Jur. (N.S.) 124.

(2) Joh. 500. 6 Jur. N.S. 140

(3) Law Rep. 6 Ch. 551.

(4) 2 Wh. & T. L. C. 548, 562.

(5) 6 Hare, 273.

(6) 1 S. & S. 174.

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materials, and all they have done has been to leave them on our land. The alleged contract did not vary the position of the parties. In all the cases cited there has been either acquiescence by the Defendant or part performance by the Plaintiff. What is the contract, and where is the evidence of it? The only equity alleged is that the contract is not under seal; but that alone does not give a right to come to this Court. If the contract had been under seal the Plaintiff could not have come here, and would have been told to sue at law. What he asks, in fact, is simply payment of £5000, and that relief the Court of Equity does not decree. The Court has never assumed a jurisdiction merely because there was no seal to one of the instruments pleaded. The same argument was used in *Kirk* v. *Guardians of Bromley Union* (1). To give the Plaintiff what he asks would be to prefer him to creditors under seal and according to the constitution of the company.

Mr. *Kingdon*, in reply :—

We ask for rent. The company cannot be allowed to keep the cottages and pay no rent for them. It is not true that *Peto & Co.* merely left the materials; they built much better houses than they wanted for their own purposes, and they did this on the faith of this agreement, which the company now deny. Neither the company nor its creditors can be allowed to keep our cottages and pay us nothing for them.

June 5. LORD HATHERLEY, L.C., after stating the facts of the case, continued :—

Undoubtedly this case is of a very peculiar character, and in some respects almost of first impression.

It is not alleged by the Plaintiff that there was any formal written agreement between the parties, but it is alleged that the agreement is to be found in letters written by the agents, and in resolutions of the directors. We must, therefore, take it upon the allegations in the bill, that a person who was duly authorized by the company to enter into an engagement did enter into an engagement that if the Plaintiff would build substantial cottages instead of huts, and would leave those cottages standing, then the company would pay the Plaintiff £500 a year, or in lieu of that £5000.

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(1) 2 Ph. 640; 12 Jur. 85.

The Plaintiff, no doubt, is in a position of considerable difficulty, because one of the provisions under which the company was founded is that all contracts and engagements must be entered into under seal. The Plaintiff, however, avers that the secretary was duly authorized to enter into this agreement, and further, that communications by letter took place between him and the secretary, and that the company did pay the £500 a year. This the Plaintiff says is evidence of the contract, and he says that it was performed by erecting substantial cottages and leaving them there, and that the company had recognised the contract by paying the £500 a year. It appears, however, that both sides have found it difficult to shape their respective demands, and after a time the company chose to treat themselves as agents for the Plaintiff to receive the rents of the cottages and pay them to the Plaintiff up to the extent of £500. This, upon the statements of the bill, they had no right to do, and the Plaintiff accordingly requires the company to pay the £500 a year whether the cottages are let or not.

This agreement is very peculiar. It is not averred that the cottages being built on the land of the company, they agreed to demise them to the Plaintiff, and then to take by sub-demise from him, as might, I presume, be done in *Turkey*; but the agreement averred is an agreement to build houses on land of the company, and to be paid so much for so building.

Now that is a money contract not enforceable in this Court. Nor can the Plaintiff call to his aid *Lord Cairns' Act* (21 & 22 Vict. c. 27), because it has been settled conclusively that the Court will not give damages under that Act unless it has original jurisdiction for specific performance. If the Court has jurisdiction for specific performance, but performance would be inconvenient, then the Court would be enabled to exercise an option, and to give damages, but not otherwise.

In this state of things, another view of the case was very ably and ingeniously suggested by Mr. *Southgate* and Mr. *Kingdon*. They argued that the case came within the doctrine laid down by another class of cases such as *East India Company* v. *Vincent* (1), where a landowner allows another man to spend money upon the land in the belief that he will have the profit. This Court holds such conduct to amount to a contract by the landowner that the person who spends the money shall have possession of that on which the money is spent, and the enjoyment of the property he has so created.

That class of cases is numerous, and in some of them the difficulties with regard to corporations have been got over, and it has not been allowed to a corporation, any more than to an individual, to take the benefit of any misapprehension into which the other person has been led, and on the faith of which misapprehension the other person has expended money on the land.

But that class of cases has no application to a case like this. They are all founded on the ignorance of the person who has been allowed to proceed as if he were himself the owner, and the Court has only in such cases assumed the existence of an engagement that the person who has been allowed to build shall have the rights which he supposed himself to have. Here, however, the contractors knew that the land was not theirs, and that what the company were to do was to pay £5000 for the cottages which the contractors were building.

I understand that the Master of the Rolls did not refer to the other branches of the argument, and said shortly that the case was reduced to a money contract. I believe he was right; and that this being a money contract, and not a proper subject for specific performance, the Court cannot give relief by way of damages. In the case of *Kirk* v. *Guardians of Bromley Union* (2), although bad faith on the part of the Defendants was alleged, it was held that there was no contract on which an action could be brought at common law; and that therefore a bill could not be filed in order both to constitute and to enforce the alleged contract.

The truth is, that every one who deals with corporations like these must be taken to know what are their powers of contracting, and must take a contract accordingly; and when there is only a money demand, and there is no valid contract, then this Court cannot interfere in the matter.

(1) 2 Atk. 83.

(2) 2 Ph. 640; 12 Jur. 85.

I certainly was impressed with the consideration of the length to which these doctrines might be carried; but I think that the arm of the Court is always strong enough to deal properly with such cases. There might be a contract without seal under which the whole railway was made, and of which the company would reap the profit; and yet it might be said that they were not liable to pay for the making of the line. When any such case comes to be considered, I think there will be two ways of meeting it. It may be (and perhaps is so in this case) that the contractor has his remedy against the individual with whom he entered into the contract, although he may have no remedy against the company; or it may be that the Court, acting on well-recognised principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment. But the matter in question here is collateral to the main object of the company, and is not essential to the existence of the railway for which the company was incorporated; and in that respect this case differs from the case I have supposed, and does not call for the interference of the Court.

I think the position of the Plaintiff is very unfortunate; but subject to what remedy he may have at law against the persons who entered into the engagement with him, it appears to me that he is left without remedy.

I must dismiss the appeal; and it being a case in which the law is settled, I am obliged to dismiss it with costs.

Solicitors for the Plaintiff: Messrs. *Baker, Folder, & Upperton.*
Solicitor for the Defendants: Mr. *H. P. Sharp.*

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April 16, 23,
25, 29; May 6.

10 Ch 669
675,
2 Ch D. 829.
2 app Cas 317
2 Ch D 830, 2

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[1869 M. 30.]

Patent—Anticipation—Combination—Specification—Useless Machine.

Where a machine for which a patent had been granted was shewn to produce work more expeditiously, more economically, and of a better quality than any previous machine:—

Held (reversing the decision of *Bacon*, V.C.), that the patent could not be invalidated on the ground that the machine was formed by the mere arrangement of common elementary mechanical materials, producing results of the same nature as those previously accomplished by other mechanical arrangements and construction.

The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine.

Foxwell v. *Bostock* (1) considered.

THIS was an appeal by the Plaintiff from a decree of Vice-Chancellor *Bacon* dismissing his bill, which was filed to restrain the infringement of a patent.

In the specification filed on the 8th of December, 1866, the invention was thus described: "This invention of improvements in machinery for making bricks relates more particularly to the mechanical appliances for cutting the clay (as it passes out of the exit aperture of the kneading or brickmaking machine) into bricks of the desired shape and dimensions. To this end, supposing a quantity of clay of the proper sectional area and sufficient length to form say twelve bricks has been expressed from the kneading machine and delivered on to the table of the machine about to be described, the proper length to form from eight to twelve bricks is first cut off by means of a vertical wire or wires mounted in a reciprocating frame which is capable of moving to and fro on guides affixed to the side standards or other suitable part of the machine. The proper length of clay having been thus cut off, the lump is next pushed forward against a series of fixed wires, whereby it is divided up into bricks of the usual and proper dimensions. This pushing forward of the lump of clay is effected by means of a second moveable frame or table, to which is adapted a series of separate blocks or pistons, which, as they advance, push forward the clay against and past the fixed wires. This advance of the clay is effected by means of a hand-lever, or by means of a rack and pinion motion, which is acted upon by a winch handle or a hand-wheel. If desired, the vertical wires against which the clay is pressed in order to divide it into bricks may have a slight upward motion given to them, so that the operation of dividing the clay may be effected by means of a kind of drawing cut." The specification then, after describing the machine by reference to drawings, concluded as follows: "Having now described my invention of 'Improvements in Machinery for making Bricks,' and having explained the manner of carrying the same into effect, I claim as the invention secured to me by letters patent the arrangement and construction of parts herein set forth for cutting clay into bricks. I claim particularly cutting the clay into the form of bricks, by forcing the clay forwards, by means of a pushing board or otherwise, against a series of fixed wires so arranged that the clay is pushed or forced past the wires on to a moveable board provided with handles, so that twelve or any other convenient number of bricks may be removed at the same time."

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(1) 12 W. R. 723.

S C as to discovery of manner of [illegible]
18 W.R. 115. V.C.B.
S C on question of breach of injunction.

By the 8th paragraph of his bill, the Plaintiff alleged that in January, 1869, he discovered that the Defendants had made and sold a machine which contained all the special improvements in the Plaintiff's machine, and was a fraudulent imitation of it. He alleged that in the Defendants' machine, supposing a quantity of clay of the proper sectional area and of the proper length to make say twelve bricks had been expressed from the kneading machine, it was delivered on to a table of the same character, and in the same manner as shewn in the Plaintiff's specification; that in the Defendants' machine the proper length to form from eight to twelve bricks, was first cut off by means of a wire mounted on a guide affixed to a bottom centre, the only difference being that the wire acted radially and not vertically, which was only a colourable difference, and that in the Defendant's machine, the proper length of clay having been cut off by the radial wire, the lump was pushed forward so as to be opposite to a series of fixed wires which were fastened to a moveable frame, in which respect there was a

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colourable difference between the two machines, as the cutting of the lump in the Defendants' machine was effected by the passage of the wires through it, whereas in the Plaintiff's machine the lump of clay was driven by a moveable pushing-board through the wires; in which particular the Defendant's contrivance was not an improvement on the Plaintiff's invention.

The Defendants admitted by their answer the points of similarity alleged by the 8th paragraph of the bill, but alleged that the Plaintiff, by his specification, did not make any claim to the effecting those operations by machinery, and that they had been performed by brickmaking machines which were in use before the Plaintiff's patent. They admitted the utility of the invention to which the Plaintiff laid claim, but denied that he was the first or true inventor, and alleged that it was known and used in the country before his patent.

One of the two inventions which were chiefly relied upon by the Defendants as invalidating the Plaintiff's patent for want of novelty was a machine patented by *Dahlke* in 1863. *Dahlke,* by his provisional specification, said: "This invention consists in mounting upon a frame, with wheels for travelling on rails or trams, a set of rollers covered by an endless belt, which belt receives the clay as it is expressed from a moulding machine. At the further end of the rollers other rollers are fixed, and over them a frame capable of traverse motion. Between the endless belt and traverse frame a cutting wire or blade is placed, and the far end of the traverse frame is provided with a door, which usually remains closed, but which may be opened when required. The endless belt rollers and the traverse frame are all connected to the wheeled frame, and capable of being moved to and fro. On the clay being fed from the moulding machine, it travels along the endless belt, and its outer ends abut against the door before mentioned. The cutter is then brought into action, and severs the clay between the endless belt and that contained in the traverse frame. Then the traverse frame is pulled out laterally, whereby the clay is brought into contact with say three cutting wires or blades, and the three portions of clay so cut, are removed, ready for being stacked." It appeared that this invention had been found practically unserviceable, and it never came into use.

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The other invention relied upon was a machine stated to have been made by the Defendants, and exhibited at their works in 1864. One of the Defendants, being in *Germany* in 1863, brought home with him a description of a machine invented by *Sachsenberg*, which was similar to *Dahlke's* machine. The Defendants stated that, towards the latter end of 1864, they made a working model of this machine, with this variation, that they substituted a plane table for the rollers, and that this machine was shewn at their works to a great number of engineers and brickmakers. It did not appear, however, that it was considered by them to be practically useful, and a witness, who had been employed to exhibit it, deposed that it was very laborious to work it, and that if it had been adapted to cut six bricks, the labour would have been so great that one man could not have worked it at all.

In 1866 Mr. *Dixsee*, then a partner in the Defendants' firm, took out a patent for a machine for cutting bricks, but it contained no moveable board for receiving the bricks, and was in other respects so materially different from that of the Plaintiff, that it was not suggested that it was an anticipation of it.

Vice-Chancellor *Bacon* having dismissed the bill with costs (1), the Plaintiff appealed.

(1) 1872. Jan. 13.
Sir James Bacon, V.C.:—

Many authorities have been referred to, and the decisions of Judges of the greatest eminence, in cases of the utmost interest, have been quoted. It is needless for me to say that I listen to and consider those authorities with unbounded respect and deference. The principles of the law applicable to the subjects with which they deal are, however, much older than any of those cases. Highly valuable as the cases are, inasmuch as they contain unqualified recognition of well-established principles, their great interest consists rather in the admiration which is excited by the clear, nervous, forcible manner in which the terms of the law are expressed—by the dialectic skill which is displayed—in many of such judgments, than in any addition which those judgments contribute to the previously existing law on the subjects to which they relate. Possessing those characteristics, it is not surprising that they are referred to and quoted whenever occasion requires. But I am satisfied that none of the Judges who have been mentioned in the course of the argument imagined they were laying down any new law, or doing more than state in their own forcible style the rules and axioms of that law which they knew to exist, and the application of that law to the particular cases then before them.

The law upon the subject of patents is clear and simple. Long before the *Statute of Monopolies*, it was decided at

Mr. *Webster*, Q.C., Mr. *Higgins*, Q.C., and Mr. *R. Melville*, for the Appellant.

Mr. *Fooks*, Q.C., and Mr. *Aston*, Q.C., for the Defendants.

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common law that the royal prerogative authorized the grant of a patent or monopoly to any man "who, by his own wit and invention, did bring any new trade into the realm, or any engine tending to the furtherance of a trade that was never used before."—*Noy's* Reports, p. 182.

In the 21st year of the reign of *James* I. an Act (21 Jac. 1, s. 6) was passed, which is commonly called the *Statute of Monopolies*, of which the 6th section protects letters patent for "the sole working of new manufactures, to the true and first inventors of such manufactures, which others, at the time of making such letters patent, shall not use." And this statute has been always held and rightly considered not to introduce a new law, but to be declaratory of the common law, and simply to exempt patents which were good at common law from the penalty which the statute imposes upon such patents as were thereby prohibited (3 Co. Inst. c. 85, pp. 181, 184).

Numerous as have been the cases which have since been decided on the subject of patents, the law thus established has never been in any degree departed from or lost sight of.

The reasons and principle of the law are as obvious as its expression is distinct and plain.

A petitioner for a patent alleges to the Crown that he has made a new and useful discovery. As a just reward for such discovery, assuming the allegation to be true, the Crown grants him the exclusive use of his invention. If the allegation turns out to be untrue, the grant becomes void. The validity of the patent in this and in all other cases must depend upon the fact whether the alleged invention is or is not new, and upon the establishment of that fact this case must be determined.

Now, in endeavouring to determine the question of fact thus raised, I must observe that it is obviously impossible to reconcile the conflicting statements of the witnesses respecting the *Sachsenberg* machine, said, on the Plaintiff's behalf, to have been made at the end of 1866 and the early part of 1867, and by the Defendants' witnesses to have been made in 1864 and 1865. It has occurred to me as possible that the workmen—*Newland*, the *Westacott's*, and others—may be mistaken in the date which they assign to the operations in which they were engaged; and as it has been proved that a machine of the like kind was made at the works in October, 1866, and sold, and sent to *America*, that all that they have said on the subject may be true with respect to that machine. But although I am unwilling to suppose that any of these witnesses have been guilty of wilful mis-statements, it would be unsafe to rest my opinion on any speculative mode of reconciling their statements with the facts proved. Having, however, carefully considered the printed depositions, and having had the still more satisfactory opportunity of observing the manner in which the witnesses orally examined have given their testimony, and being compelled to form a conclusion as to the matters of fact which are involved—and in this respect to discharge the function of a jury—I must say that it is proved to my satisfaction that the statements of the Defendants *Clayton* and *Burdett*, and their

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Mr. *Webster*, in reply.

The following cases were referred to: *Jones* v. *Pearce* (1); *Crane* v. *Price* (2); *Huddart* v. *Grimshaw* (3); *Daw* v. *Eley* (4); *Lister* v. *Leather* (5); *Cannington* v. *Nuttall* (6); *Hill* v. *Evans* (7);

witnesses *Bodman*, *Bell*, *Peter Clayton*, and *Hardman*, as to the time when, and the circumstances under which, the *Sachsenberg* machine was constructed and publicly used, and as to the manufacture and sale of a similar machine in 1866, corroborated as they are by the production of the original drawings made by *Burdett*—the working drawings made by *Bodman* and executed by *Bell*—the entries in *Dixsee's* books and the invoice in *Clayton's* handwriting, and the memorandum of the shipment to *America* by *Peter Clayton*—are to be relied on in preference to those of the Plaintiff's witnesses; and I cannot therefore hesitate to find, as a fact, that this *Sachsenberg* machine was made and used before the date of the Plaintiff's patent. Nor can I hesitate to believe that Mr. *Andrew Murray* is mistaken in the conclusion which he draws from his inspection of the machine on the two occasions he mentions after the sale had commenced, or doubt that no more was done to the machine on those occasions than that which is described by *Bodman*, and is of no substantial importance. The Plaintiff's charge, therefore, that the Defendants fraudulently caused the machine to be altered, in my opinion wholly fails of proof.

Now, turning to the Plaintiff's specification, let us see what it asserts and describes. It asserts the Plaintiff to be the inventor of improvements in machinery for making bricks, and that such invention relates more particularly to the mechanical appliances for cutting the clay, as it passes, into bricks of the desired shape and dimensions. Neither here nor in any other part of the specification is any mention made of any previously existing machinery for making bricks. It may mean some or all of such machinery, and neither here nor elsewhere does the Plaintiff state the nature of any particular improvement made by him. It goes on to describe the effect and operation of the improvements: "A sufficient quantity of clay being expressed from the kneading machine, and delivered on to the table to be described, the proper length to form from eight to twelve bricks is first cut off by means of a vertical wire." In *Sachsenberg's* machine, "to separate the stream of clay a piece is cut off by means of a fine steel wire." In *Dahlke's* specification, "between the endless belt and transverse frame a cutting wire is placed, which severs the clay between the endless belt and that contained in the transverse frame." The Plaintiff says, "The proper length of clay being thus (*i.e.*, by means of the vertical wire) cut off, the lump is next pushed forward against a series of fixed wires, whereby it is divided into bricks." In *Sachsenberg's* description, "the length of the piece of severed clay, forming the thickness of three bricks, is now on a second horizontal sliding frame, which is pushed or pulled quickly through on

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(1) 1 Webs. Pat. Cas. 122.

(2) Ibid. 393.

(3) Ibid. 85.

(4) Law Rep. 3 Eq. 496.

(5) 8 E. & B. 1004.

(6) Law Rep. 5 H. L. 205.

(7) 4 D. F. & J. 288. 8 Jur. N.S. 525

(5) S.C. 3 Jur. N.S. 811, 4 Jur. N.S. 947.

Neilson v. *Betts* (1); *Parkes* v. *Stevens* (2); *Brook* v. *Aston* (3); *Carpenter* v. *Smith* (4); *Stead* v. *Williams* (5); *Househill Coal and Iron Company* v. *Neilson* (6); *Foxwell* v. *Bostock* (7).

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the carriage between two fixed parallel steel wires, which causes the cutting of the piece of clay into three separate bricks ready then to be taken into the shed for drying." In *Dahlke*, after the mass of clay has been severed, "the transverse frame is pulled out laterally, whereby the clay is brought into contact with say three cutting wires or blades, and the three portions of clay so cut, say bricks, are removed ready for stacking." In *Banham's* specification the "clay is divided by wires into the size of bricks, and by the aid of the boards conveyed into the drying room." In *Cookson* and *Homer's*, the plastic material is forced "through dies of the requisite shape on to tables where it is cut into pieces of proper length by wires mounted in a traversing frame." In *Dixsee's* the cutting wires are fixed in a frame, "and when the frame is moved from one side to the other the wires pass through the clay."

So far, therefore, the means employed in the several inventions are substantially the same, and the result is exactly the same. But in the description of the Plaintiff's drawings which form a part of his specification, he mentions a pushing board which he says is "moved forward, and pours the lump of clay past the fixed wires on to a board placed at the part indicated of the table. The clay will thus be left in the form of bricks, and the lot may be removed at once by lifting up the board on which they are placed." Much was said in the course of the argument as to this particular, and it was said that this operation, by avoiding the risk of spoiling the bricks by handling, would support the patent. It is however clear that, in the other patents, whether the clay be pushed against the wires or the wires forced through the bricks, the result is the same; there must, of necessity, be in each case something to uphold the bricks; it is not necessary that they should in any case be removed by hand; and *Dixsee's* invention is distinctly stated to provide lateral supports for the bricks, so that "the cutting wires are prevented from breaking the bricks or pressing them out of shape."

I do not stop to notice the statement of Mr. *Bramwell* that the alteration of the arm by which the push board is made to cut, has been altered in the Plaintiff's model, No. 4, so as to be materially different from that described in the specification; nor is it necessary to advert to the Plaintiff's claim for "a moveable board provided with handles," since it has been abundantly proved that moveable boards for the same purpose are an old and well-known contrivance; and, indeed, the claim is, as I have said, given up as a substantive thing, although the Plaintiff still claims it as a part of his invention. But, having examined and considered with the utmost attention the Plaintiff's and

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(1) Law Rep. 5 H. L. 1.

(2) Law Rep. 8 Eq. 358; Ibid. 5 Ch. 36.

(3) 8 E. & B. 478. 4 Jur. N.S. 279

(4) 9 M. & W. 300.

(5) 7 Man. & G. 818.

(6) 9 Cl. & F. 788.

(7) 12 W. R. 723.

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May 20. SIR W. M. JAMES, L.J., after stating the nature of the suit, and giving a summary of the evidence that the Plaintiff's machine was novel and useful, continued :—

There being, then, this proof of the utility and of the *de facto*

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the other specifications and drawings, I am unable to discover a trace of novelty in the machinery, or in the means of applying it, or in the results produced by its employment. That the Plaintiff's machine is capable of producing from eight to twelve bricks at one operation cannot be of importance, since by increasing the size of the frame or table (and the word seems to be convertible) and by adding to the number of cutting wires, the number of bricks produced may be just such as the manufacturer thinks fit.

But then it has been argued very strenuously on the part of the Plaintiff—and indeed the argument in reply was chiefly directed to this point—that, notwithstanding all the facts proved, the Plaintiff's invention, consisting of a combination of mechanical principles and agents not in themselves new, but consisting of "the arrangement and construction of the parts described" in the specification and drawings, such arrangement and construction so claimed by him would support his patent; and in support of this argument great stress was laid upon the facts proved by the Plaintiff's witnesses — that the bricks made by his machine were worth 2*s.* per thousand more than any others, and that it could produce from 3000 to 5000 more bricks *per diem* than any other machine with which the witnesses were acquainted; and there were many of such witnesses, well acquainted with brick making and with the machines employed in that manufacture, who spoke of the Plaintiff's machine in terms of unqualified commendation, and said that, according to their knowledge, it was a novelty, and an improvement upon all the brick-making machines with which they were acquainted. But, assuming all this to be true, I do not think it can therefore be held that the Plaintiff is entitled to the monopoly which the patent purports to grant. No doubt a combination of things not in themselves new, but which combination is perfectly new in the form in which the inventor has cast it, and producing new and more beneficial results, may be the subject of a patent: *Huddart* v. *Grimshaw* (*Webster's* Patent Cases, 85). But I am aware of no case in which it has been held that the mere arrangement of common elementary mechanical materials, and the construction by means of such arrangement of a machine which produces no other result than that which had been previously accomplished by other mechanical arrangements and construction, would support a patent. If it were so, there would be no protection to the public or to earlier patents against the ingenuity of any artisan who might have the skill to arrange the old mechanism in a new shape, and thereby to appropriate to himself the fruits of previous inventors in the proper sense of that term, so that the privilege and reward which the law only concedes to art and wit and invention might be bestowed upon mere skill in handicraft.

If, however, there were in this instance any such novelty in the arrangement adopted by the Plaintiff as would give to what is called his invention the character of an art, it is neither shewn by the evidence, nor is it stated in novelty of the Plaintiff's invention, it is necessary to consider whether that novelty is *de jure* as well as *de facto*, that is to say, whether there has been any such anticipation of the invention, either by any former patent or by any former user of any other machine as to invalidate his right to the protection of the patent law. Now it will be convenient, before considering that, to see what is the true construction of the Plaintiff's specification, and what it is that he has claimed by it. [His Lordship here read the material parts of the specification, as given above.]

Now I am of opinion that the plain meaning of that specification is that the Plaintiff claims the machine, that he claims the combination as the means of enabling him to produce this result, namely, that the workman can by one turn of the wrist at once cut a mass of clay into twelve or more bricks, put upon a board so that they may be removed from there to the drying place without ever being touched by the hand of the operator. The claim is not to any particular part; it is not a claim to the wire for cutting, because everybody knows that wire will cut a plastic substance; nor to the forcing the plastic substance against the wire, because everybody knows that whether you move the substance or move the cutting instrument you produce a division in that way. It is not a claim for the table, any more than for the legs of the table, or anything else that forms a part of the machine. It is a claim for

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terms in the specification, which contains no mention of or reference to any previous machines or mode of operating upon which it is assumed, under the vague generality of the title and claim, that the Plaintiff's invention is an improvement. The law applicable to this subject is stated in most clear terms by Lord *Westbury* in his judgment in *Foxwell* v. *Bostock* (12 W. R. 723). It was said, indeed, that the question there decided related to an extremely complicated machine, and no doubt that was so; but the decision was upon a principle of law, which must be the same to whatever subject it may be applied.

[His Honour read a passage from Lord *Westbury's* judgment, and continued :—]

With this very clear exposition of the law, founded as it is upon the authority of many decided cases, I am bound to hold, as I do, that the Plaintiff's specification is insufficient in the respect I have last mentioned. And upon this ground—but not upon this ground alone—I am of opinion, having regard to the pleadings and to the evidence in this cause, that, for the reasons I have endeavoured to express, the Plaintiff's suit fails, and his bill must be dismissed.

the entire machine, produced by the arrangement and construction of the parts thereinbefore set forth.

That, then, being the claim, let us see whether it has been in any manner anticipated. The only things upon which any great stress has been laid before us are *Dahlke's* patent, and the machine called the "German Machine," being in truth another form of *Dahlke's* machine, which is said to have been in use at the works of the Defendants, partly during his time and partly during the time of his partner, who was an intermediate owner before he resumed the possession of it.

[His Lordship then read the material parts of *Dahlke's* specification, which described a complicated apparatus, from which the bricks, after having been cut, were taken away by hand, and claimed the combination as the subject of the patent.]

It is quite clear to my mind that the invention of *Dahlke's* is a thing so substantially different in its principle, and all its details, from that of the Plaintiff, that if it were made to-day for the first time it could not be considered as an infringement of the Plaintiff's patent. The only similarity that I can find in them is that in each there is a division by a cutting wire of a lump of clay into bricks, and that that division is effected by means of the pressure of the clay against the cutting wire. As I said before, it appears to me a matter of common knowledge that clay can be cut by a wire, and that it is a mere matter of arrangement whether you cut it by means of pressing it against the wire, or letting the wire press through the material itself. This patent of *Dahlke's*, after having had a fruitless existence for three years, as we were told at the bar, was suffered to expire before the Plaintiff's patent was taken out.

Now we come to deal with the machine which the Defendants say was used in their works. With regard to that, there was in the Court below a great mass of contradictory and utterly irreconcilable evidence; and it was quite clear that the witnesses on one side or the other were not speaking the truth. The Vice-Chancellor came to the conclusion that the weight of evidence was in favour of the Defendants and their witnesses as to the time at which this machine was made and used at the Defendants' works. The Plaintiff's counsel before us has thought it best not to invite us to

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reconsider that matter, and has in fact said that, according to his view of the case, it is wholly immaterial, and that, in some aspects of the case, the Defendants' account of that machine is strong evidence indeed in support of the Plaintiff's case. One of the Defendants says that he, or a person representing him, was in *Germany* in the year 1863 or 1864, and there saw the *Sachsenberg* machine, or a description of it, and he thought it worth while to bring home with him the German description of it, which he has produced in evidence. This machine is, in fact, the same as *Dahlke's;* and the Defendant says that, from the description which he brought home, a machine was made at the latter end of the year 1864, but made with this variation, that finding the rollers cumbersome and useless, he substituted for them a table, which, he says, answered the same purpose as the plane table surface in the Plaintiff's patent. He says that the Defendants made that machine, and that it was exhibited at work to a great number of engineers and brickmakers. It does not appear, however, that the machine itself was a machine actually made for sale. It was, no doubt, a working specimen—not the thing itself, which he wanted to sell, but a working specimen, for which he was ready, as a maker, to take orders. Now, of all those machine makers and engineers and brickmakers whom he represents as having seen the thing tried and in work, not one has been called to prove that he thought the machine of the slightest utility. One witness only there is who says that he was in the habit of going with people to shew them the Defendants' machines, and, amongst others, they inspected in his presence this German machine; but none of them would buy it, because the common table cost £4, and the German machine would cost £15. That seems very nearly conclusive as to its being of no use; for if it had substantially saved any labour in the process of brickmaking, such a difference of price would be a matter of no importance whatever. There is no doubt that a brickmaker in much work would spend £11 or £15 over and over again in order to get a machine which would give him the slightest probability of effecting any economy in his work. No machine of this description was ever bought; and upon a change of partnership upon Mr. *Clayton* retiring, leaving his partner, Mr. *Dixsee*, in possession, this machine and another were valued together by the

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outgoing and incoming partners as worth £3, which, probably, was hardly the value of the materials. Then, on the other side, there is the evidence of *Newland*, who says that it was an entire failure; that it was utterly useless for all practical purposes whatever; that when he was working it for the purpose of shewing it, he could not work at it for more than a quarter of an hour or twenty minutes at a time on account of the labour being so great, and that, in his opinion, if it were arranged so as to make six bricks at once instead of the three which it did make, it would be utterly impossible for a man to work it at all. Other witnesses gave evidence to the same effect. This evidence fully explains why the thing was an absolute and entire failure, because the merit of every invention of this kind is that it saves labour. If, then, a machine requires more labour to work it than would be required to do the same work by hand, that machine is, as described by the witnesses, a perfectly useless and abortive attempt at improvement. On the other hand, there is the evidence of Mr. *Bramwell* (and perhaps there may be some other witnesses who speak to the same effect) that he has seen the machine at work, and that it is "a perfectly efficient machine." We have seen it worked here in Court, and no doubt in one sense it is an efficient machine; it does cut off the three bricks, but that is all that it does. There is nothing whatever to countervail the evidence that it is practically quite useless. Now, I am not aware of any principle or authority upon which the exhibition of a useless machine which turns out a failure can be held to affect the right of a patentee who has made a successful machine, although there may be a degree of similarity between some of the details of the two machines. This question is not wholly untouched by authority. In *Jones* v. *Pearce* (1) a patentee had patented a particular wheel. The evidence shewed that a wheel constructed on the same principle had been used by Mr. *Strutt* at his works near *Derby*, first on the road for a long time, and afterwards for conveying articles of farm produce from his farm to the works; but after it had been used for some years it had been put aside, and when worn out it was never replaced. This had taken place some years before the Plaintiff had taken out his patent. There had been the public use of these wheels upon

(1) 1 Webs. Pat. Cas. 122.

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the roads, and Mr. Justice *Patteson* left the case to the jury in these terms: "If, on the whole of this evidence, either on the one side or the other, it appeared that this wheel, constructed by Mr. *Strutt's* order in 1814, was a wheel on the same principles, and in substance the same wheel as the other for which the Plaintiff has taken out his patent, and that it was used openly in public so that everybody might see it, and he had continued to use the same thing up to the time of taking out the patent, undoubtedly then that would be a ground to say that the Plaintiff's invention is not new, and if it is not new of course his patent is bad, and he cannot recover in this action. But if, on the other hand, you are of opinion that Mr. *Strutt's* was an experiment, and that he found it did not answer, and ceased to use it altogether, and abandoned it as useless, and nobody else followed it up, and that the Plaintiff's invention which came afterwards was his own invention, and remedied the defects, if I may so say, although he knew nothing of Mr. *Strutt's* wheel he remedied the defects of Mr. *Strutt's* wheel, then there is no reason for saying the Plaintiff's patent is not good." Therefore, if there were defects in the German machine which made it useless, and the Plaintiff afterwards made a machine in which those defects were remedied so as to make it a good machine instead of an abortive one, he would be entitled to maintain his patent.

But the case does not stop there. The Defendants appear to have been the only persons in *England* who knew of the German machine. It had attracted their attention so much that they brought over the description of it to this country; they made one of these machines, improved it, and tried it, and having their minds applied to the obtaining the same object or a similar object, they never think of making a table at all like that of the Plaintiff. Instead of that, they make a machine apparently of considerable merit, which is known as *Dixsee's* machine. This machine, the patent of which is before us, is substantially and materially different in all respects from the Plaintiff's machine, and it has not been suggested to us that it is an anticipation of the Plaintiff's machine. Of course if it were the parties would be reversed, because *Dixsee's* patent is still in force, and the owner of it would be filing his bill against the Plaintiff.

[His Lordship then considered the evidence given by Mr. *Bernays*, an assistant civil engineer at *Chatham Dockyard*, as to a trial by the Admiralty of several brickmaking machines in 1865, in which the Defendants were among the competitors, and continued :—]

This evidence shews that the Defendants, when competing for Government work, with all the knowledge they possessed from this previous user, which is said to be an anticipation of the Plaintiff's patent, never thought of anything in any way like the machine which the Plaintiff invented; and it is scarcely possible to get stronger evidence of the entire novelty of the Plaintiff's machine. The machine, too, when produced, is so simple and so completely adapted to effect its object, that one feels disposed to wonder how people could have gone on for thousands of years making bricks without ever having thought of it; but that is the case with many noted inventions—when the thing is once hit it seems a marvel that it was not hit before.

Before proceeding to consider the last question, that of infringement, it is necessary to refer to the Vice-Chancellor's judgment. His Honour, after referring to the evidence of the witnesses who spoke of the Plaintiff's machine in terms of unqualified commendation, and said that, according to their knowledge, it was a novelty and an improvement upon all the brickmaking machines with which they were acquainted, says: "But, assuming all this to be true, I do not think that it can therefore be held that the Plaintiff is entitled to the monopoly which the patent purports to grant. No doubt a combination of things, not in themselves new, but which combination is perfectly new in the form in which the inventor has cast it, and producing new and more beneficial results, may be the subject of a patent; but I am aware of no case in which it has been held that the mere arrangement of common elementary mechanical materials, and the construction, by means of such arrangement, of a machine which produces no other result than that which had been previously accomplished by other mechanical arrangements and construction, would support a patent. If it were so, there would be no protection to the public or to earlier patents against the ingenuity of any artisan who might have the skill to arrange the old mechanism in a new shape, and thereby to

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appropriate to himself the fruits of previous inventors, in the proper sense of that term, and so that the privilege and reward which the law only concedes to art, and wit, and invention, might be bestowed upon mere skill in handicraft."

I find it very difficult to reconcile this proposition with what has been said by many Judges in many cases, and more particularly in the case of *Crane* v. *Price* (1). Now, no doubt *Crane* v. *Price* has been questioned, and if I may be permitted to say so, with all respect to the very powerful tribunal which decided that case, I have never been satisfied with the decision. That, however, was simply because I could not see how the word "combination" could be properly applied to the introduction of a particular kind of fuel into a machine which had been patented for the use of every kind of fuel in the making of iron; and neither I nor, so far as I am aware, any other Judge has ever questioned the principles upon which that case was decided, and which are thus laid down in the judgment of the Court delivered by Chief Justice *Tindal* (2): "We are of opinion that if the result produced by such a combination is either a new article, or a better article, or a cheaper article to the public, than that produced before by the old method, that such combination is an invention or manufacture intended by the statute, and may well become the subject of a patent. Such an assumed state of facts falls clearly within the principle exemplified by *Abbott*, C.J., where he is determining what is or what is not the subject of a patent, namely, it may, perhaps, extend to a new process to be carried on by known implements or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind. And it falls also within the doctrine laid down by Lord *Eldon*, that there may be a valid patent for a new combination of materials previously in use for the same purpose, or even for a new method of applying such materials. But the specification must clearly express that it is in respect of such new combination or application."

That being so, I cannot concur with the Vice-Chancellor in saying that the patent of the Plaintiff was to be invalidated upon the principle which he has laid down, because, if the evidence is to be believed, what the Plaintiff has done is that he has produced a thing in a more expeditious manner, in a more economical manner, and of a better quality. We have then to determine whether the Defendants' machine is an infringement of the Plaintiff's patent—whether it is a reproduction of the Plaintiff's machine with colourable alterations, with the use of what have been called "mechanical equivalents." It appears to me that the Defendants have simply made a transposition, that is, that instead of moving the clay against the wires they have made the wires move against the clay. It appears to me that what Mr. *Pole* has said on the subject in his evidence is perfectly accurate. He describes the details of what is done by the Plaintiff's machine, and what is done by the Defendants' machine, and he says this amounts simply to inverting the relative motions of the parts in regard to each other, the essential action and the result produced being identical in the two cases. That is exactly the case of a colourable variation. This machine, which was made by the Defendants after they had seen the Plaintiff's machine in use, effects the same object; but, according to the evidence (which is not contradicted), it effects it by an enormously greater expenditure of power, as to which we may refer to the language of Lord *Hatherley* in *Daw* v. *Eley* (1), to the effect that a clumsy imitation of a patented machine or a patented article may be an infringement, although it is not such as would have been an anticipation defeating the Plaintiff's right.

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(1) 1 Webs. Pat. Cas. 393.

(2) 1 Webs. Pat. Cas. 409.

Perhaps I ought, before parting with the case, to refer to the observations of the Vice-Chancellor, that the Plaintiff's specification is not sufficient upon the principles laid down by Lord *Westbury* in *Foxwell* v. *Bostock* (2). I had occasion to deal with an objection grounded on *Foxwell* v. *Bostock* in the case of *Parkes* v. *Stevens* (3), and I refer to what I said in that case, because I find it was in substance approved of and affirmed by the Lord Chancellor on appeal. I there said: "It is obvious that a patentee does not comply, as he ought to do, with the condition of his grant if the improvement is only to be found, like a piece of gold, mixed up with a great quantity of alloy, and if a person, desiring to find out what was new and what was claimed as new, would have to get rid of a large portion of the specification by eliminating from it all that was old and common-place, all that was the subject of other patents or of other improvements, bringing to the subject not only the knowledge of an ordinary skilled artisan, but of a patent lawyer or agent." I go on to say: "After all, the question of sufficiency of specification is not a question of law, it is a question really of fact in each particular case. In this case I am of opinion that the patentee has a right to have his specification of 1865 read with his specification of 1862; and, reading them together, I do not think any maker of lamps would have any substantial difficulty in ascertaining what was claimed under the general description of the arrangement and combination of parts hereinbefore described and represented in the drawings annexed." Accordingly, upon the issue of the validity of the patent and the sufficiency of the specication, I found for the Plaintiff, although I found for the Defendant upon the question of infringement. Both sides appealed, and the present Lord Chancellor, in his judgment, says: "As to the validity of his second patent, which has been disputed, there is a clear line marking off the old from the new" (the objection was that the Plaintiff had taken out two patents, each of them for improvements in the same direction and in the same terms, and that he did not say which part was covered by the old as distinguished from the new), "in a manner which could not be mistaken by anybody properly understanding the English language, and no one would be obliged to have recourse to further investigation (which was the ground of the decision in *Foxwell* v. *Bostock* (1)) in order to know what parts he might take and what parts he might not take under each patent. I think, therefore, that there is no objection to the specification upon that ground." I am of opinion here, on the same principle, that there is no valid objection to the specification, founded on the decision in *Foxwell* v. *Bostock*, even if the specification were objected to by the Defendants in their answer, which it is not.

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(1) Law Rep. 3 Eq. 496.

(2) 12 W. R. 723.

(3) Law Rep. 8 Eq. 358.

Upon the whole, I am of opinion that the Plaintiff has made out that he is the true inventor of a new and useful invention, that the Defendants have failed to make out any objection to the Plaintiff's

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(1) 12 W. R. 723.

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specification, and that the Defendants are proved to have infringed the Plaintiff's patent. Therefore, I am of opinion that the Vice-Chancellor's decision should be reversed, and that in lieu thereof there should be a decree for a perpetual injunction against the Defendants, with the usual consequential direction as to the account to be taken.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Vallance & Vallance*; Messrs. *Wilson, Bristow, & Carpmael.*

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In re IMPERIAL LAND COMPANY OF MARSEILLES.

HARRIS' CASE.

Contract—Acceptance by Letter—Revocation—Allotment of Shares—Delegation of Power—New Condition.

A contract is complete when a letter has been posted accepting an offer which can be accepted by letter so sent.

A letter of application for shares in a company was put into the post, and was duly received by the directors. A committee appointed by the directors allotted 100 shares to the applicant, and the secretary of the company put into the post a letter addressed to the applicant informing him that the shares had been allotted to him, and that 10 per cent. interest would be charged on the balance due in respect of the shares. The letter was duly received by the applicant, but before he received it he had sent by post a letter declining to accept any shares:—

Held, that the contract was completed when the letter announcing the allotment of the shares was put into the post:

Held, that under the articles of association of the company, the allotment of shares by a committee instead of by the whole board of directors, was valid:

Held, that the provision for payment of interest on the balance was not a new term introduced into the contract.

Decision of *Malins*, V.C., affirmed.

Dunlop v. *Higgins* (1) discussed.

British and American Telegraph Company v. *Colson* (2) disapproved of.

LR 15 Eq 2
1 CPD. 8
1 Ch D. 466
3 Ch D 72,
4 Ch D. 7
2 App Ca
691
4 Ex D 21
224-5, 2
5 CPD. 34

IN February, 1866, the prospectus of a company in *London*, called the *Imperial Land Company of Marseilles, Limited*, was published, requiring applicants for shares to pay £1 per share on application and £4 on allotment, and stating that interest at the rate of 10 per cent. per annum would during the construction of the works be paid to the shareholders.

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(1) 1 H. L. C. 381.

(2) Law Rep. 6 Ex. 108.

Mr. *Lewis Harris*, of *Dublin*, filled up a letter of application for shares as follows:—

> "To the Directors of the *Imperial Land Company of Marseilles, Limited.*
>
> "Gentlemen,—Having paid to your credit with the *National Bank* the sum of £200, being the deposit of £1 per share on 200 shares in the above company, I request that you will allot me 200 shares of £20 each in the *Imperial Land Company of Marseilles, Limited*, and I hereby undertake to accept the same, or any smaller number which you may allot to me, and to pay the balance, £19 per share, thereon; and I agree to become a member of the company, and request you to place my name on the register of members, in respect of the shares allotted to me.
>
> "I am, Gentlemen,
> "Your obedient servant,
>
> "Name in full: *Lewis Harris.*
> "Address in full: 19, *Suffolk Street, Dublin.*
> "Profession: Bill broker.
> "Usual signature: *L. Harris.*
> "Date: 5th March, 1866."

This letter was sent by Mr. *Harris* to the directors through a bank, and was duly received. The directors appointed a committee to allot the shares, and 100 shares were allotted to Mr. *Harris* (1). A letter from the secretary of the company, containing notice of this allotment, addressed to Mr. *Harris* at his *Dublin* address, was put into the post-office at *Lombard Street*. There was some dispute as to the exact time of posting, but the letter was posted either on the 15th or very early in the morning of the 16th of March, 1866, and was received by Mr. *Harris* at *Dublin* on the 17th. This letter, after stating that the directors had allotted to Mr. *Harris* 100 shares in the company, on which a balance of

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(1) The articles of association of the company provided for the appointment of a board of directors, and contained the following clauses:—Sect. 7: "The shares shall be allotted by and at the discretion of the board." Sect. 87: "The directors may delegate any of their powers to committees consisting of such number of the members of their body as the directors may think fit."

£300 was payable to the bankers of the company not later than the 21st of March, 1866, proceeded thus:—

"As the interest warrants attached to the shares bear interest from the 21st of March, 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at 10 per cent. per annum."

On the 16th of March Mr. *Harris* had written, and put into the post at *Dublin*, the following letter addressed to the directors in *London*, declining to accept shares in the company:—

"Gentlemen,—On the 5th of March instant I paid to your credit into the *National Bank, Dublin*, £200, being a deposit of £1 per share on an application for 200 shares in the above company. I hereby give you notice that, inasmuch as up to this date I have received no allotment, I hereby withdraw the aforesaid application, and request you will forthwith return me my deposit of £200, as I shall not accept any shares now allotted, or hold myself in any way liable."

The secretary of the company answered on the 17th of March that it was too late to withdraw the application for shares; and Mr. *Harris's* name was placed on the register of members as holding 100 shares. Mr. *Harris*, however, by his solicitors continued to deny that he was a shareholder, and much correspondence passed on the subject.

An order was made for winding up the company, and Mr. *Harris*, and two other persons in a similar position, on the 23rd of July, 1869, took out a summons to have their names removed from the list of contributories.

The Vice-Chancellor *Malins* dismissed the summons (1), and Mr. *Harris* appealed.

(1) 1872. March 4. W.N. '72, 54

SIR R. MALINS, V.C., after stating the facts of the case, said, that the first serious objection which had been made on behalf of Mr. *Harris* was that the allotment was altogether invalid as having been made by a committee, and not by the board of directors; and the 7th clause of the articles, stating that the shares were to be allotted by and at the discretion of the board, was relied upon. This was a very serious objection, for if it prevailed the whole allotment was invalid. But the 87th clause provided for the delegation by the directors of their powers to

Mr. *Cole*, Q.C., and Mr. *Everitt*, for the Appellant:—

We say that the contract to take shares was not binding until the letter allotting them was received: *British and American Telegraph Company* v. *Colson* (1); *Townsend's Case* (2); *Hebb's Case* (3). No doubt there have been cases where a contract has been held complete when the letter accepting an offer has been posted; but these were all mercantile cases, in which the law is necessarily different. Until the letter has reached its destination, the acceptance may be retracted: *Dunlop* v. *Higgins* (4).

Moreover, the letter of allotment is not a simple acceptance, but introduces a condition as to interest which is a new term: *Oriental*

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committees. It was therefore clear that the directors might so delegate the duty of allotting shares, and it was very proper that they should do so. On this point *Howard's Case* (Law Rep. 1 Ch. 561) was referred to, but in that case there was no valid delegation of authority, and it did not affect the present case. This objection had altogether failed.

Then as to the question of acceptance, and as to when a letter of acceptance became binding. His Honour then stated the facts in the case of *Dunlop* v. *Higgins* (1 H. L. C. 381), and said that if it was the law that a letter was not binding until it was received, then *Dunlop & Co.* could not have been held to be bound. In *British and American Telegraph Company* v. *Colson* (Law Rep. 6 Ex. 108) the letter of allotment was never received. The facts of the present case came to this: The offer made on the 5th of March was a continuing offer on the 15th, when it was duly accepted. The allotment of shares was made and duly communicated to Mr. *Harris* by a letter posted before he wrote the letter repudiating the shares. The contract was, therefore, at all events, complete when the letter of allotment was posted; and his letter of repudiation was too late, for he was bound by his letter of acceptance.

The next point relied upon was that the letter of allotment fixed the 21st of March for payment of the call, and provided for payment of interest if the calls were not punctually paid; and this, it was said, introduced a new term. But fixing the 21st of March instead of the date of the allotment, was an extension of time in favour of the allottee; and as to interest, the allottee was to receive interest, and could anything be more reasonable than telling him that he must pay, or, in other words would not receive interest unless he paid the money? This was not the introduction of a new term, but a reasonable intimation. The case of the *Oriental Inland Steam Company* v. *Briggs* (4 D. F. & J. 191) (a) was unlike this, as a new and unusual term was certainly introduced in that case. In *Peek's Case* (Law Rep. 4 Ch. 532) the allottee was held to his contract.

All the objections had failed, and Mr. *Harris's* name must remain on the list, and he must pay the costs of the summons.

(1) Law Rep. 6 Ex. 108.
(2) Ibid. 13 Eq. 148.
(3) Ibid. 4 Eq. 9.
(4) 1 H. L. C. 381.

(a) S.C. 8 Jur. N.S. 201

Inland Steam Company v. *Briggs* (1); *English and Foreign Credit Company* v. *Arduin* (2).

Another objection is, that the allotment is void as being made by a committee instead of by the directors, in direct contravention of the seventh clause of the articles.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, Q.C., for the liquidators, were not called upon.

SIR W. M. JAMES, L.J.:—

I feel no doubt whatever as to the propriety of the judgment of the Vice-Chancellor in this case.

Three grounds have been taken on behalf of the Appellant. One is, that upon the construction of the articles of association the allotment was invalid, because it was made by a committee of the directors. But the articles have in terms provided that the directors might delegate anything to a committee; and that they did delegate this duty to this committee appears in evidence before us. It was a proper and reasonable mode of dealing with such a thing as the investigation of the applications for shares and the allotment of them. It appears to me, therefore, that there is nothing in that ground of appeal

The second ground is that on which the greater part of the argument has been addressed to us; that there was a letter posted in *Dublin* recalling the application for shares before the letter posted in *London* containing the notice of the allotment was received in *Dublin;* the letter of revocation not being in the course of post capable of arriving in *London* before the letter of allotment was actually posted by the company.

Now it appears to me that the Vice-Chancellor's decision is correct, and that the contract was completed the moment the notice of allotment was committed to the post addressed to the address in *Dublin* which Mr. *Harris* himself had given. That decision seems to me to be entirely in accordance with a great number of cases in this Court, and to be utterly undistinguishable, in principle or in fact, from *Dunlop* v. *Higgins* (3), a case which is

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(1) 4 D. F. & J. 191. 8 Jur NS 201 (2) Law Rep. 5 H. L. 64.

(3) 1 H. L. C. 381.

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binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment. He arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it. That is in fact the decision in *Hebb's Case* (1), though in that particular case a distinction was taken by the Master of the Rolls that the company chose to send the letter to their own agent, which agent had not been authorized by the applicant to receive it on his behalf.

Against this current of authority there is the case of *British and American Telegraph Company* v. *Colson* (2), in which the Court of Exchequer—not disputing the authority of the previous decisions, because, of course, they could not dispute the authority of a case in the House of Lords—established a distinction which does not apply to this case at all. The Court there held that although the posting of the letter, if the letter arrives, is a complete contract, yet if from any cause, such as a failure of duty by the Post Office, the letter never arrives at all, then there is a difference.

It seems to me not necessary to express any opinion as to whether that distinction is sound or not, but that was the ground upon which the Judges proceeded in that case. In this case the letter did arrive, and having arrived the contract was complete, and could not be revoked, from the time when the letter was posted. It was completed in exactly the way which the Appellant desired, that is to say, he gave his address in *Dublin*, and the company, according to the ordinary usage of mankind in those matters, returned their answer through the post. That is a complete contract. It does not signify what was the particular hour of arrival of the one letter or the other, or which was the first, the delivery in *London* or the delivery in *Dublin*. That appears to me wholly immaterial, because the contract was completed at the time when the letter of allotment was properly posted by the company.

The other point raised was, that there was a condition annexed to this allotment letter, and on this point the case of *English and*

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(1) Law Rep. 4 Eq. 9.

(2) Law Rep. 6 Ex. 108.

Foreign Credit Company v. *Arduin* (1) was cited. Now the facts in that case were such as persons might differ about, and the Exchequer Chamber held one way while the House of Lords held another way. But the principle upon which they all proceeded, which is the only thing we have to deal with, was, that where there is an acceptance of an offer, if there is to be a term or condition imposed, it must be clearly so stated, otherwise it is to be considered simply as a notification which may have such effect as it ought to have in a Court of Law. Here the acceptance was unqualified:—[His Lordship read the letter of allotment.] It appears to me that the statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent., but it is that he ought to pay exactly on the 21st of March, 1866, and that by way of indulgence the directors have told the bankers, that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorized to receive payment, but not otherwise. It is a mere notification, not intended to be a new stipulation, and it never was considered by the Appellant, or by anybody who received such a letter, as a new term introduced. It would be contrary to the usage of all mankind to treat this as being the introduction of a new term, altering or affecting the express acceptance of the application for shares.

I am of opinion, therefore, that the order of the Vice-Chancellor is right, that on all the grounds this appeal has failed, and must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion, and I agree with what the Lord Justice has said on the first and the last grounds, and also on the second ground. The only part of the case upon which I wish to add any observations is on the second ground, which raises a question of very great general importance, and that is this: When a person in one part of the country writes to a person in another part of the country a letter containing an offer, and either directly or impliedly tells him to send his answer by post, and an answer accepting that offer is returned by post, when is a com-

1 CPD
2 App Ca
692

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(1) Law Rep. 5 H. L. 64.

plete contract made? Is it made at the time when the letter accepting the offer is put into the post, or is it not made until that letter is received? It was contended before us that it is not made until the letter is received; so that until it is received the contract may be revoked by the person who has made the offer.

Now throughout the argument I have been forcibly struck with the extraordinary and very mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received. No mercantile man who has received a letter making him an offer, and has accepted the offer, could safely act on that acceptance after he has put it into the post until he knew that it had been received. Every day, I presume, there must be a large number of mercantile letters received which require to be acted upon immediately. A person, for instance, sends an order to a merchant in *London* offering to pay a certain price for so many goods. The merchant writes an answer accepting the offer, and goes that instant into the market and purchases the goods in order to enable him to fulfil the contract. But according to the argument presented to us, if the person who has sent the offer finds that the market is falling, and that it will be a bad bargain for him, he may at any time, before he has received the answer, revoke his offer. The consequences might be very serious to the merchant, and might be much more serious when the parties are in distant countries. Suppose that a dealer in *Liverpool* writes to a dealer in *New York* and offers to buy so many quarters of corn or so many bales of cotton at a certain price, and the dealer in *New York*, finding that he can make a favourable bargain, writes an answer accepting the offer. Then, according to the argument that has been presented to us to-day, during the whole time that the letter accepting the offer is on the *Atlantic*, the dealer who is to receive it in *Liverpool*, if he finds that the market has fallen, may send a message by telegraph and revoke his offer.

Nor is there any difference between an offer to receive shares and an offer to buy or sell goods. And yet, if the argument is sound, then for nearly ten days the buyer might wait and speculate whether the shares were rising or falling, and if he found they were falling he might revoke his offer. Those consequences are very extraordinary, and I always understood the law to be the other way until the case of *British and American Telegraph Company* v. *Colson* (1), which has caused some doubt on the subject.

I will shortly refer to the previous cases on the subject. The first case is *Adams* v. *Lindsell* (2). No doubt there were two points in that case. An offer was sent by post, but the letter was misdirected through the mistake of the party who sent it, and therefore did not arrive until two days afterwards. And that point was disposed of during the argument, that inasmuch as it was the fault of the party sending it, the answer having been written and posted as soon as it did arrive, no advantage could be taken of the delay caused by the misdirection. But the person who sent the offer, finding no answer had arrived, sold the goods before the answer had arrived, and then it was argued that until the answer was actually received there could be no binding contract between the parties, and therefore no breach of it. But the Court of King's Bench said that if the law was so, "no contract could ever be completed by the post. For if the Defendants were not bound by their offer when accepted by the Plaintiffs till the answer was received, then the Plaintiffs ought not to be bound till after they had received the notification that the Defendants had received their answer and assented to it; and so it might go on *ad infinitum*." That appears to me to be at any rate an expression of opinion on the part of the Court there, that when an offer is made by letter, and is accepted by a letter which is posted, then there is a binding contract between the parties from the time when the letter is posted.

2 Ch D 4

In *Dunlop* v. *Higgins* (3) the question was directly raised whether the law was truly expounded in the case of *Adams* v. *Lindsell*, and the House of Lords approved of the ruling in that case. The Lord Chancellor *Cottenham* said, in the course of his judgment, that in the case of a bill of exchange, notice of dishonour given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken* v. *Collin* (4) as an authority on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the

4 Ex D

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(1) Law Rep. 6 Ex. 108.

(2) 1 B. & A. 681.

(3) 1 H. L. C. 381.

(4) 7 M. & W. 515.

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same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams* v. *Lindsell* (1), and quoted the observation of Lord *Ellenborough*. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post.

4 Ex D 222

There is then the case of *Duncan* v. *Topham* (2), in which there were no doubt several questions, on one of which, whether posting the acceptance was sufficient, Mr. Justice *Cresswell* told the jury that if the letter accepting the contract was put into the Post Office, and lost by the negligence of the Post Office authorities, the contract would nevertheless be complete. There was then a motion for a new trial, and though Mr. Baron *Bramwell*, in *British and American Telegraph Company* v. *Colson* (3), has said that he thought the case not properly reported, still it appears as if Mr. Justice *Maule* and Chief Justice *Wilde* both assented to the ruling of Mr. Justice *Cresswell*, and refused the rule on that point.

In addition to that, there is the case of *Potter* v. *Sanders* (4), which is also a direct decision of a Court of Equity on the point.

4 Ex D 223

Against them there is simply this case of *British and American Telegraph Company* v. *Colson*, and that is not a direct decision on this point. The Lord Chief Baron, in the course of his judgment, says, it may be that if the letter arrives in time, then the contract will be treated as having been made from the time when the letter was put into the post; but I do not see how there can be any relation back in a case of this kind, as there may be in bankruptcy. If the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. Still that case is not a direct decision on the point before us, though I confess I have great difficulty in reconciling it with the previous decision in *Dunlop* v. *Higgins* (5). That case was commented on at considerable length both by the Lord Chief Baron and by Baron *Bramwell*, but they only commented on the facts of the case, and shewed—which I think they did shew—that according to the facts of the case the Plaintiff

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(1) 1 B & A. 681.
(2) 8 C. B. 225.
(3) Law Rep. 6 Ex. 108.
(4) 6 Hare, 1.
(5) 1 H. L. C. 381.

L. JJ.
1872
Harris' Case.

might very well have had a verdict, even if the rule of law had been that the contract was not made until the letter arrived, because there the only thing which prevented the arrival of the letter was the bad weather, which made the mail very late. And therefore I agree, upon the facts of that case, that the Plaintiff might have recovered, even although the law was that the contract was not made until the letter arrived. But then the real question before the House of Lords in *Dunlop* v. *Higgins* was, whether the ruling of the Lord Justice General was correct in point of law, and the House of Lords held that it was correct.

However, I agree with the Lord Justice that it is not necessary to give any decisive opinion on the point, because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted. That, however, is not the case before us; the letter did arrive in due time; and the question is whether, under that state of circumstances, the parties are bound by the contract.

4 Ex D2

Solicitor for Mr. *Harris*: Mr. *W. C. Smith*.
Solicitors for the Liquidators: Messrs. *G. S. & H. Brandon*.

LORD AUCKLAND *v.* WESTMINSTER ~~LOCAL~~ District BOARD OF WORKS.

[1871 A. 126.]

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May 28, 29.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 74, 75 —*General Line of Buildings*—*Vacant Ground*—*Buildings pulled down by a Railway Company*—*Jurisdiction*—*Injunction.*

[illegible]

The 75th section of the *Metropolis Management Amendment Act*, 1862, does not apply to ground formerly covered with buildings, unless the owner has relinquished his right of rebuilding on the same site. If, therefore, the District Board of Works threatens to proceed under the 75th section to demolish houses which are being rebuilt on an old site, on the ground that they are beyond the general line of buildings, it is acting *ultrà vires*, and may be restrained by the Court of Chancery. In such a case the Metro-

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6 Ch. D. 463, 5-7,
15 Ch. D. 500

politan Board ought to proceed under the 74th section of the same Act, which provides for compensation to the landowners.

A railway company took land covered with houses, and pulled down the houses for the purpose of constructing their railway, and then sold the land as building ground to the Plaintiff:—

Held (affirming the decision of *Malins*, V.C.), that the Plaintiff had not lost the right to rebuild the houses on the same site as that occupied by the houses before they were pulled down; and that for this purpose the yard of a house was held to be equivalent to a house.

In determining the general line of buildings of a street the architect of the Metropolitan Board of Works ought to have regard to the frontage of houses previously existing, and which may be rebuilt, as well as to those still standing.

THIS case came before the Lords Justices on appeal from an order made by Vice-Chancellor *Malins* on an interlocutory motion for an injunction; but when the appeal was opened, it was arranged that the matter should stand over till the hearing, and that notice of motion for decree should be given, and the cause should be heard before the Lords Justices.

The facts were as follows: The *Metropolitan District Railway*, under the powers of their Act, took a piece of land in *Westminster*, on which three houses were standing, numbered 1, 2, and 3, in *Buckingham Row*. The company pulled down the houses, and, after the completion of the railway, put up the land for sale by auction as building ground. The land was purchased by the Plaintiff on the 21st of February, 1871, for £650, and was conveyed to him accordingly.

The piece of land lay at the corner of a narrow passage about five feet wide, called *York Place*, which led from *Buckingham Row* to *Brewers Row*. The corner house of the three which had been pulled down, when standing came close up to the passage. After passing the back yard of the corner house the passage ran past a row of five small cottages, numbered 13 to 17, *York Place*, which stood at right angles to *Buckingham Row*. These cottages stood back about twenty feet from the passage, with gardens between them and the passage. After passing this row of cottages the passage was continued for a distance about equal to the frontage of the cottages to *Brewers Row*, but after the cottages were passed the buildings ran close up to the passage.

The Plaintiff purchased the property for the purpose of building stables on it, and having prepared the plans of the proposed new buildings, he submitted them to the *Westminster* District Board of Works, in accordance with the *Metropolis Management Act*, 1855 (18 & 19 Vict. c. 120), s. 76. The District Board made no objection to the plans within the fifteen days prescribed by the *Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. c. 102), s. 63.

On the 2nd of August, 1871, Mr. *Vulliamy*, the superintending architect of the Metropolitan Board of Works, sent to the Plaintiff's solicitors an order which, after reciting the 75th section of the *Metropolis Management Amendment Act*, 1862, proceeded as follows:—

"And whereas Mr. *James Rogers*, solicitor to the Board of Works for the District of *Westminster*, and Mr. *R. R. Arntz*, surveyor to the said board (Messrs. *Lambert & Son*, of No. 30, *Bedford Row*, having had notice to attend the hearing before me on behalf of Lord *Auckland*, but they declined to do so), have severally appeared before me and been heard regarding the proposed erection of buildings on vacant land at the corner of *Buckingham Row* and *York Place*, in the parish of *St. Margaret, Westminster*, and beyond the front or face of the buildings forming a row of houses on the eastern side of *York Place* aforesaid, such houses being numbered from 13 to 17 inclusive, and I have been required to decide the general line of buildings in such place as provided in the said statute—

"Now, therefore, having considered the several matters, I, the undersigned, being the superintending architect to the Metropolitan Board of Works, do hereby, pursuant to the said Act, decide that the main fronts of the buildings forming the row of houses aforesaid, and tinted pink on the plan hereto annexed, and signed by me, is the general line of buildings on the eastern side of *York Place* aforesaid.

"*George Vulliamy*,
Superintending Architect to the
Metropolitan Board of Works."

The effect of this proposed line of buildings was to prevent the Plaintiff from building upon nearly half of the land purchased by him.

The Plaintiff, having in vain endeavoured to obtain a reversal

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of the architect's decision, applied to the Metropolitan Board of Works for compensation under the 74th section of the *Metropolis Management Amendment Act*, 1862, but they refused to entertain the application.

The District Board having threatened to put their powers in force against the Plaintiff if he proceeded to build beyond the line laid down by the architect of the Metropolitan Board, the Plaintiff filed the present bill, in which he prayed that the order of the superintending architect might be declared to be invalid, and that the District Board might be restrained from interfering with the erection of the proposed buildings by the Plaintiff, and from recovering any penalties in respect thereof.

The Vice-Chancellor having granted an interlocutory injunction, a/ the Defendants appealed, and the appeal motion and the cause now came on together before the Lords Justices (1).

(a) See W R (1872) 68.

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(1) The sections referred to are as follows:—

25 & 26 Vict. c. 102, s. 74:—"In case any building situated within any of the parishes, districts, or places comprised in the schedules of the firstly recited Act, which shall in any part thereof project beyond the general line of the street in which the same may be situate, or beyond the front of the building, wall, or railing, on either side thereof, shall at any time be taken down to an extent exceeding one half of such building, such half to be measured in cubic feet, or shall be destroyed by fire or other casualty, or demolished, pulled down, or removed from any other cause to the extent aforesaid, it shall be lawful for the Metropolitan Board of Works to require the same to be set back to such a line and in such a manner for the improvement of any street as the said board shall direct, provided that the said board shall make compensation to the owner of such building for any damage and expenses which he may sustain and incur thereby."

Sect. 75:—"The 143rd section of the first recited Act (18 & 19 Vict. c. 120), and the 140th section of the 7 Geo. 4, c. 142, are hereby repealed, and in lieu thereof be it enacted that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses, in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway, when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is

Mr. *Glasse*, Q.C., and Mr. *Macnaghten*, for the Plaintiff:—

The fifteen days prescribed by the 63rd section of the *Metropolis Management Amendment Act*, 1862, having expired without any objection being made by the Defendants to the Plaintiff's plans, their power of interference under that section ceased. They are now threatening to interfere with the Plaintiff under the 75th section of that Act, and to demolish his buildings without giving any compensation. This could not be the intention of the Legislature; it would amount to a confiscation of the property of the Plaintiff. The Defendants' contention is based upon a misunderstanding of the 74th and 75th sections of the Act. If this case comes at all within the Act it is within the 74th section, which gives power to the Metropolitan Board, in the case of buildings which have been pulled down and rebuilt, to restrict them to the general line of the street; but provides that compensation shall be given to the owners. The 75th section only applies to vacant ground which has never been built over. In the present case the Plaintiff purchased the interest of the railway company, and he has the same rights as if he had himself pulled down the buildings immediately before the notice was served.

But we also contend that the certificate of the architect is entirely fallacious. He has treated the site of the buildings as vacant ground, and has taken the line of the five cottages as if there were no other houses in the passage; whereas the houses that were pulled down, and the houses at the other end, come close up to the footpath. For this purpose the back yard of the lower house is to be treated as part of the house, and the Plaintiff has a

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situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons, to answer such complaint, and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing."

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right to build over it: *Lord Grosvenor* v. *Hampstead Junction Railway Company* (1). The Defendants are acting entirely *ultrà vires*, and the Plaintiff is therefore entitled to the interference of this Court, and is not confined to his remedy of disputing the certificate before a justice of the peace: *Tinkler* v. *Wandsworth Board of Works* (2); *Frewin* v. *Lewis* (3); *Stone* v. *Commercial Railway Company* (4); *River Dun Navigation Company* v. *North Midland Railway Company* (5).

Mr. *Bristowe*, Q.C., and Mr. *Cracknall*, for the Defendants:—

The question in this case is entirely within the jurisdiction of the justices of the peace, by whom the Plaintiff might have had the architect's certificate rectified if it was erroneous, and might have appealed to a Court of Common Law, which is the appointed tribunal for such questions. We therefore submit that this Court ought not to entertain the suit.

The Defendants were acting entirely within their powers. They were right in treating this as vacant ground within the 75th section. That section is not restricted to land which had never been built over. The intention was that no house, whether a fresh erection or the rebuilding of an old one, should extend beyond the general line of the street. The 74th section was for a different object; it was to insure the regularity of the line of houses, not to regulate the width of the street. But in the present case the Plaintiff's land was, strictly speaking, vacant ground. The railway company by taking it changed the character of the land. The buildings were not pulled down for the purpose of being rebuilt, and the Plaintiff is therefore not in the position of a landowner whose houses have been pulled down or demolished within the terms of the 74th section. [They referred to *Vestry of St. George, Hanover Square* v. *Sparrow* (6); *Bauman* v. *Vestry of St. Pancras* (7); *Wandsworth Board of Works* v. *Hall* (8); *Simpson* v. *Smith* (9).]

(1) 1 De G. & J. 446. 3 Jur. N.S. 1085
(2) 2 De G. & J. 261. 4 Jur. N.S. 293
(3) 4 My. & Cr. 249.
(4) Ibid. 122.
(5) 1 Railw. Cas. 135, 154.
(6) 16 C. B. (N.S.) 209. 10 Jur. N.S. 77
(7) Law Rep. 2 Q. B. 528.
(8) Ibid. 4 C. P. 85.
(9) Law Rep. 6 C. P. 87.

Sir W. M. James, L.J. :—

I am of opinion that the order of the Vice-Chancellor granting an injunction is perfectly right.

The Plaintiff, Lord *Auckland*, comes to this Court and complains that a public body threaten and intend, under colour of certain great powers given them by Act of Parliament, to take and pull down some buildings which he has a right to erect, and is about to erect, on his own property. He complains that by these threats they have embarrassed him in the application of his property to the purpose he desires, and have in fact prevented him from erecting his building, because they tell him in plain terms that if he does build they will put in force the powers of their Act, and pull down his building. This being the complaint, it appears to me to be a plain case for the exercise of the jurisdiction of this Court. What is the case? A man files his bill with regard to a grievous wrong which is threatened to be inflicted upon him by a public body, and he has a right to see whether this body has the power to inflict this wrong upon him; or, at all events, to try and relieve his title from the cloud which is put upon it by this proceeding, which has been taken under a public Act of Parliament by public functionaries intrusted with great and arbitrary powers. It seems to me to be the same kind of case as those well-known cases in which this Court has exercised its jurisdiction by restraining railway companies from proceeding to take land which they had power to take for one purpose, for some other purpose for which they were not entitled to take it; or to take part of a house only, where the law obliged them to take the whole of it. In those cases the Court has stopped them at once and granted an injunction, because they were about to exercise their powers in a manner that was oppressive or in a manner that was illegal. I have no doubt therefore that this is a case within the jurisdiction of this Court, and that it is a case proper for this Court to decide once for all instead of obliging Lord *Auckland* to go before a magistrate and discuss before him the question of jurisdiction and the difficult construction of these Acts of Parliament, and then to carry the case to the Court of Queen's Bench by *certiorari*, or to take some other step to get it finally decided.

Then comes the question, Is what the *Westminster* Board of

Works threatens to do in any manner justified by the Act of Parliament? I am of opinion, on more grounds than one, that their whole proceeding is clearly *ultrà vires.* The land in question is the site of lately-existing buildings, which site and buildings were taken for some purpose or other in connection with the construction of the *Metropolitan District Railway.* I am of opinion that Lord *Auckland,* as the purchaser of that site from the *Metropolitan District Railway Company,* who were the purchasers from the former owners, has exactly the same rights in every respect as those owners had before their houses were pulled down, and has exactly the same rights as he would have had if he had bought the ground with the houses standing upon it, and had taken them down himself a few days ago for the purpose of building what he now intends to build in their place. In that case it appears to me quite clear that his position comes exactly within the provisions of the 74th section, which enacts that where any part of a building which has been demolished, pulled down, or removed had projected beyond the general line of the street in which the same was situated, then the Metropolitan Board of Works has power, when the owner is about to rebuild, to direct him to put back his new building into such a line and in such a manner for the improvement of the street as the board should direct. Supposing, then, that in this case the condition precedent to the 74th section is found to exist, that section is to my mind clearly applicable.

But then it is contended that although the 74th section provides that a man's property may be taken in a certain way upon a compensation being given him, the 75th section goes on to enact that it is to be taken away without any compensation at all by the same body. I am of opinion, having regard to the old clauses in lieu of which this 75th section was enacted, and having regard to the 74th section which immediately precedes it, and to the whole context of the Act and the whole spirit of recent legislation with regard to dealing with private persons' property, that the 75th section was only meant to apply to the case of a new building, structure, or erection being built on land which, for the purposes of the Act, would properly have been described by Mr. *Vulliamy* as vacant ground. I am therefore of opinion that there was no jurisdiction in the Metropolitan Board or in the District Board to interfere with any building which Lord *Auckland* might erect on that land, except in accordance with the provisions of the 74th section; that the 75th section does not apply at all to it; and that Mr. *Vulliamy's* line, whether rightly or wrongly laid down by him as the general line of the street, would not authorize them to interfere with Lord *Auckland's* property.

But then I am further of opinion that Mr. *Vulliamy's* order, on the face of it, is perfectly monstrous and utterly void. It is easy to see how the error arose, namely, from Mr. *Vulliamy* treating the site of the old building as being vacant ground. That appears upon the face of the order which he has pronounced. He comes to the decision of the question as to the general line of the street on the assumption that Lord *Auckland's* property is to be treated as vacant ground, and then he finds what he supposes to be a line, being the line made by four or five houses; that being, as he thought, the only line that he could find, considering the mode in which the question was submitted to him. I think that if Mr. *Vulliamy's* attention had been drawn to this, that he was to ascertain what the general building line of *York Place* was, as things stood before the houses were taken down, he never could have made such an order as this, the effect of which is much the same as if a man said that the old line of the front of *Burlington House* was the general line of *Piccadilly*. I am of opinion that he has fallen into a mistake, and that he has never determined the line in the manner in which he ought to have determined it, namely, what was the line before the houses were taken down.

I do not think we ought to make any declaration as to the 74th section, because the Metropolitan Board are not before us. There will therefore be a declaration that, notwithstanding Mr. *Vulliamy's* order purporting to set out the general line of the street, Lord *Auckland* is entitled to build on the whole of the property included in the purchase, and an injunction to restrain the District Board from interfering with such building; and the Plaintiff must have the costs of the suit.

Sir G. Mellish, L.J.:—

I am of the same opinion. I think it impossible to read with any care the 74th and 75th sections of the *Metropolis Management Amendment Act*, 1862, without coming to the conclusion that no case can be intended to be within the 75th section, which is within the 74th; because the 74th section, if any house is pulled down or is destroyed which is beyond the general line of the street, gives power to the Metropolitan Board to require that when it is built up again it shall be set back, paying compensation. Now it seems absurd to suppose that the Legislature could have intended that in that very same case they might, instead of proceeding under sect. 74, proceed under sect. 75, and say, "You shall put your house back to the general line of the street without receiving any compensation whatever." To make the two sections consistent with each other, I think that we must construe the words "no building, structure, or erection" in the 75th section to mean no building, structure, or erection built or erected for the first time. Then comes the question, whether this present case, assuming against Lord *Auckland* that there may be a general line of street in *York Place*, is within the 74th section. Of course if the same person who had pulled the buildings down was intending to erect them again, then it would be directly within the 74th section. But ought the 74th section to be confined to that? In my opinion it would be very absurd to confine it to that, because if a man pulls down his building, intending to erect a new one, why should he not be allowed to sell the site with the same power of erecting the building as he himself had? It appears to me that the purchaser must be in the same position as the vendor, and that a subsequent purchaser from the purchaser must be in the same position as the purchaser. Then does it make any difference that a railway company was the mesne purchaser, that is, the person who purchased the property from the original owner of the building and the person who pulled it down. I do not think that that makes any difference. I do not mean to say that in every case after a building has been erected the site of that building is to remain for ever within sect. 74 and never come within sect. 75. We might suppose a case of a building pulled down and the site of the building turned to a totally different purpose—made, for instance, into an open garden. Or we might suppose a man pulling down his building and voluntarily setting it back to the general line of the street. I do not suppose that in such a case any subsequent owner who might acquire the site, or the same owner, could, after that, take advantage of its being an old site. Just in the same way, if a man pulls down a house, and the ground is left vacant for so many years that all supposed intention of rebuilding is gone, then all the right to the lights will be gone also; but if there is an intention to rebuild, even though there is a delay of two or three years, still the right to the lights would remain. And I do not suppose that it would make any difference if, when the original owner had pulled down the house, he had sold the land with the right of building the house again. In the same way I think that, in the present case, if the houses are pulled down under circumstances which would lead every one to suppose that the houses would, as a matter of course, be rebuilt, the site being practically of no value, except as building ground, it would be wrong to say that the rights which it formerly possessed as to the line of buildings are lost by the mere circumstance that the railway company has found it necessary, for the purpose of constructing their railway, to take down these houses.

It would be a hard thing on the railway company, as it seems to me, if, having purchased these houses at the full price, and being obliged to pull them down for the purposes of their railway, they were not at liberty to sell the site for the purpose of being built upon. As far as appears, they did sell the site, and Lord *Auckland* bought it on the assumption that it might be built upon. If the District Board are right in their contention, there was a defect in the railway company's title, because they would have no power to sell the land as building land without previously ascertaining the intentions of the Metropolitan Board. Therefore I am of opinion that, as regards the site of the building, it is clearly within the 74th section, and that the District Board had no power to proceed under sect. 75; and that being so, I am further of opinion that this Court has jurisdiction to grant relief in this case. The District Board threatens that, if Lord *Auckland* should erect stables on this land, they will pull them down. It is true that they must first go before a magistrate. If they do he will probably tell them that he has no jurisdiction; for it seems to me perfectly clear that he has no jurisdiction under this section. But I think Lord *Auckland* is entitled to say: "I will not wait to see whether a magistrate will decide rightly or wrongly as

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to his jurisdiction in this case; I will not go before a magistrate at all, but I will go into the Court of Chancery for an injunction to restrain you from pulling down my stables in a case where you have no power to pull them down."

Then the only other question on which there can be any doubt is, whether there is any difference between the actual site of the house and the courtyard, which was behind the house. In my opinion there is no difference. The front of the house was not towards *York Place* at all, but the side of the house ran all along *York Place*, and beyond that there was a continuous wall of some height, which separated the courtyard from *York Place*. Even assuming that there was a line of street in *York Place*, I do not think that would be an open space within the meaning of the 75th section. The Plaintiff has a house, and a wall beyond his house which incloses his courtyard. His courtyard is as much a private place as any other part; it is not in any way dedicated to the use of the public.

I entirely agree with what the Lord Justice has said—that, looking, as we ought to do, at the state of things as they existed before these buildings were pulled down, there really was no general line of building in *York Place* except the line which came right up to the footpath.

Therefore, upon the whole, I am of opinion that Lord *Auckland* is entitled to have the relief which he prays for, and to the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Lambert & Son.*
Solicitor for the Defendants: Mr. *J. Rogers.*

In re EVANS' TRUSTS.

L. JJ.
1872
June 3.

Trustee Relief Act—Petition for payment of Income—Costs.

Where a trust fund has been transferred into Court under the *Trustee Relief Act*, and a petition is presented for payment of the income to the tenant for life, the costs of the trustees, as well as of all other necessary parties, will be paid out of the income.

Decision of *Malins*, V.C., reversed.

In re Marner's Trusts (1) followed.

Semble: Where the title of the tenant for life is clear, the trustees ought not to appear upon a petition simply affecting the income.

THIS was an appeal from an order of Vice-Chancellor *Malins*.

In the month of February, 1872, the trustees under the will of *W. Evans* transferred the sum of £1200 *India* £4 per Cent. Stock into Court under the *Trustee Relief Act*.

A petition was presented by the two tenants for life of the fund, the persons entitled in remainder to one moiety of the fund, and the trustees, praying for the payment of the dividends to the two tenants for life till further order. This petition was served on the persons entitled in remainder to the other moiety of the fund who had declined to join in the petition.

The Vice-Chancellor ordered the costs of all parties to the application to be paid out of the *corpus* of the fund, and the Respondents appealed from the order so far as it related to the payment of the costs.

Mr. *Dauney*, for the Appellants:—

The petition only relates to the payment of the income, and, therefore, the costs ought to be borne by the tenant for life. The practice was settled by *In re Marner's Trusts* (1), which, although decided by Vice-Chancellor *Kindersley*, had the authority of all the Judges. That decision has been followed in *In re Whitton's Trusts* (2), *In re Smith's Trusts* (3), and *In re Mason's Trusts* (4).

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(1) Law Rep. 3 Eq. 432. 12 Jur. N.S. 959
(2) Ibid. 8 Eq. 352.
(3) Law Rep. 9 Eq. 374.
(4) Ibid. 12 Eq. 111.

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Mr. *Ince*, for the Petitioners:—

The course of practice has not been uniform. Lord *Cranworth's* original opinion was, that the costs ought to come out of the *corpus: In re Turnley* (1). And even since *In re Marner's Trusts* (2) there have been several reported cases where this has been done: *In re Gordon's Trusts* (3), *In re Wood's Trusts* (4), *In re Knight's Trusts* (5). If this had been an administration suit, the costs would have come out of the *corpus*. At all events, the trustees' costs ought to be so borne.

Sir W. M. James, L.J.:—

It appears to me that the practice of the Court on this point was conclusively settled by the decision in *In re Marner's Trusts*, which was the result of the deliberate opinion of all the Equity Judges, Lord *Cranworth* giving up his original opinion which he had expressed in *In re Turnley*. That decision has since been followed by several Judges—by the Master of the Rolls, by Vice-Chancellor *Wickens*, and by myself when Vice-Chancellor. I do not think we ought now to alter so well established a practice. And it certainly seems to me a rule calculated to save expense. A tenant for life who knows that he will have to pay the expense of his own application would be likely to make it in a less luxurious manner than if he had the *corpus* to resort to. It is said that a difference ought to be made with respect to the appearance of the trustees, and that this difference has been recognised in some cases. But I think that *In re Marner's Trusts* was intended to apply to all the costs of the Petition, and I am the more disposed to follow that construction because the reasonable course for a tenant for life to pursue, when about to petition for payment of his income, would be to write to the trustee and tell him that he did not seek to affect the *corpus*, but only wanted his income, and, therefore, that there would be no occasion for the trustee to incur costs by appearing. In such a case, if the title of the tenant for life is clear, the trustee ought not to appear. I am of opinion, there-

(1) Law Rep. 1 Ch. 152. 12 Jur. N.S. 305
(2) Ibid. 3 Eq. 432. 12 Jur. N.S. 957
(3) Law Rep. 6 Eq. 335.
(4) Ibid. 11 Eq. 155.
(5) 37 L. J. (Ch.) 409.

fore, that in this case all the costs ought to come out of the income.

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SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellants: Messrs. *Hooke & Street.*

Solicitors for the Petitioners: Messrs. *Tanqueray-Willaume & Hanbury.*

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[1870 F. 28.]

L. JJ.
1872
May 22, 23, 27, 28; June 11.

Trade Mark—Fancy Name becoming Publici Juris—Use of Name in Trade Circulars—Misrepresentation in Trade Mark.

A fancy name which designates a particular kind of article may be in general use in price lists which circulate between manufacturers and retail dealers without prejudicing the right of the inventor to the exclusive use of the fancy name as a trade mark in the sale of the article to the public.

A trade mark to which a trader had originally an exclusive right may in course of time become *publici juris*, and the exclusive right may be lost. The proper test of this having happened is, that the use of the trade mark by other persons has ceased to deceive the public as to the maker of the article.

The exclusive right to the use of a fancy name as a trade mark is not lost by the inventor habitually using it in conjunction with his own name as maker of the article.

The Court will not interfere by injunction to restrain the imitation of a trade mark, if there is false representation in the trade mark, or if the trade itself is fraudulent.

And, *semble*, such false representation or fraud would be a good defence to an action at law for imitation of the trade mark, on the ground that *ex turpi causâ non oritur actio.*

But a collateral misrepresentation by the owner of the trade mark will not disentitle him to relief either at law or in equity.

In a case where the Plaintiff, whose trade mark was "*Ford's Eureka Shirt,*" had falsely represented in his invoices and in a few advertisements that he was a "patentee" of the shirt:—

Held, that such false representation was not sufficient to prevent him from sustaining an action at law; and that his right at law being clear, he was entitled to an injunction in Chancery.

Decision of *Bacon*, V.C., reversed.

14 Eq 549
17 Eq 32,
18 Eq 140,
1 Ch D. 44
5 Ch D. 853
860
7 Ch D. 8
811
3 App Cas
W.N. 1879
13 Ch D 4
440. 3
686
18 Ch D
7 H.L. 219

THIS was an appeal from a decree of Vice-Chancellor *Bacon.*

The bill was filed by *Richard Ford*, of the *Poultry, London,*

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shirt-maker, against *John Foster* and others, carrying on business as *Foster, Porter, & Co.*, wholesale hosiers, in *Wood Street*, in the same city.

In or about the year 1849 the Plaintiff, who was then in business in the *Strand*, brought out a shirt of a particular shape, to which he gave the name of "*The Eureka*;" and ever since that time he had carried on an extensive trade in such shirts, and they had obtained a wide reputation.

The Plaintiff always marked his shirts on the inside at the back of the collar band with the following mark, enclosed within a line: "*R. Ford's Eureka Shirt, London*," to which he added, after the passing of the *Merchandise Marks Act*, 1862 (25 & 26 Vict. c. 85), the words "Trade Mark;" and the Plaintiff always described his shirts in all advertisements and elsewhere as "*Ford's Eureka Shirts*."

The bill, which was filed in February, 1870, alleged that the Plaintiff had recently discovered that the Defendants had for some time been manufacturing and selling to the trade shirts which they described as "*The Eureka Shirt*," by which the public were misled, and the Plaintiff's business materially injured; that the shirts manufactured by the Defendants were marked beneath the inside of the collar band with the words "*The Eureka Shirt*" within a shield-shaped border, and with a crown on the top; and that they were in the habit of issuing trade cards and price lists, advertising themselves as manufacturing and selling "*The Eureka Shirt*." The Plaintiff accordingly prayed that the Defendants might be restrained "from applying the mark or title of "*Eureka*" to any shirts manufactured by them, or to any shirts sold by them, unless such shirts had been manufactured by the Plaintiff; and from advertising for sale shirts as "*Eureka*," by issuing boxes, cards, or price or trade lists, or other advertisements, in which the mark or title "*Eureka*" should be applied to shirts not of the Plaintiff's manufacture; and for an account, and other consequential relief."

On the 19th of March, 1870, the Plaintiff moved for an injunction before Vice-Chancellor *James*, who ordered that, upon the Defendants undertaking not to apply the word "*Eureka*" to any shirt sold by them, except by the use of the words "*Foster*, *Porter, & Company's Improved Eureka,*" the motion should stand to the hearing, without prejudice to any question.

This order was taken by appeal to Lord Justice *Giffard,* who, on the 25th of March, 1870, varied the order by striking out the undertaking, and directing that notice of motion for a decree should be given within a week, the Plaintiff waiving his right to an answer (1).

(1) 1870. March 25.

Sir G. M. Giffard, L.J., after observing that he thought the Vice-Chancellor quite right in directing the motion to stand to the hearing, continued :—

Besides that, looking at the whole of the evidence, there are two very serious questions for decision at the hearing. The one is, whether the evidence can be brought to such a point as to make out that "*Eureka*" is *publici juris.* That is one very serious question, and of course upon that I shall not for one moment express an opinion.

The other very serious question is, whether the Plaintiff is or is not precluded from suing by reason of his having described himself in his invoices to a very considerable extent as "patentee" of *Ford's Eureka Shirts,* when, in fact, he is not the patentee of those shirts.

Upon these two points I shall certainly express no opinion at this moment; and I do not think that in that respect *Sir John Rolt's Act* has made the slightest difference. I take it that upon interlocutory applications what this Court considers is this: whether under the old practice it would have granted an injunction directing an action at the same time, or whether it would have abstained from granting an injunction, and then directed an action. Sitting here in the Court of Appeal, if I were to grant this injunction, it would be morally impossible for the Vice-Chancellor at the hearing to do otherwise, unless upon evidence almost wholly different from that which is before me; whereas, under the old practice, if I were to grant the injunction the Court of Law would not pay the slightest attention to any opinion I might have expressed. An expression of my opinion now upon an interlocutory motion would be all but binding on the Vice-Chancellor. Therefore, unless I was convinced that the case was perfectly clear, I certainly should not grant it, because although we now take undertakings for damages, we know perfectly well that these undertakings for damages are not a sufficient compensation to a Defendant against whom they may happen to be improperly granted.

For these reasons I am of opinion that the Vice-Chancellor was perfectly right in directing this motion to stand to the hearing.

[His Lordship then proceeded to shew why he considered the undertaking prejudicial to the Plaintiff.]

In fact, such an undertaking must be founded on the opinion that any person looking at such an expression as "*Foster, Porter, & Co.'s Improved Eureka,*" would think he was buying *Ford's* "*Eureka Shirts.*" In that opinion I confess I do not concur; and I think it is right I should say so, because it is plain to me that the term "*Eureka*" is the whole gist of this case; and if the Plaintiff's sole right is to use the term "*Eureka*" in connection with his own name, he has not a right which is worth anything whatever. I cannot

Both parties went into evidence at considerable length, both before and after the hearing of the motion for an injunction.

In one of his affidavits the Plaintiff stated that he had been frequently informed that shirts stamped or marked with his trade mark of "*Eureka*" were being made and sold in the *United Kingdom*, and were also being shipped abroad; but until very recently he had failed to discover by whom the same was being done. He then said that in January, 1870, he received from a Mr. *W. H. Turnell*, of *Wellingborough*, a shirt as a sample, accompanied by a letter, asking for a dozen shirts to match it, and for a quotation of the lowest price. The Plaintiff having answered this request, *Turnell* replied to the effect that he could get the shirts made at 13*s.* per dozen less, and asked the Plaintiff, if he did not choose to supply the shirts at the price required, to send the pattern shirt to Messrs. *Foster, Porter, & Co.* The Plaintiff stated that in consequence of the information contained in that correspondence, he made inquiries, and ascertained that shippers had obtained shirts from the Defendants marked as "*The Eureka Shirt.*"

He further said that he had, by the course pursued by the Defendants in using his said trade mark, sustained loss and damage amounting annually to many hundreds of pounds; and in a further affidavit he said that he had in advertising his said shirt expended a sum exceeding £7000.

The general effect of the evidence adduced by the Defendants was that the name "*Eureka*" was of common use in the shirt trade, as applying to shirts of a particular shape, but without reference to any particular maker, and that in a few instances it was used in the price or trade lists of manufacturers of shirts; but the Defendants failed to establish the fact that any other dealers except themselves had stamped the name "*Eureka*" on the shirts.

Mr. *Walton*, who had been for twenty years buyer in the De-

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but think that, supposing a person sees the term "*Eureka*," whether in conjunction with the name "*Ford's*," or the word "*Improved*," or the words "*Foster, Porter, & Co.'s Improved*," he would not take the least notice whether it was *Ford's*, or *Foster & Porter's*, or any one's else.

With that exception, I desire that the matter should go to the hearing quite unfettered and unprejudiced.

fendants' shirt department, gave the following account of the circumstances under which the name was first used by the Defendants:—"From the year 1862 and forward the firm of *Foster, Porter, & Co.*, sold shirts under the name of '*The Eureka Shirt*,' and the firm issued price lists to that effect from that time, and they have always been called in the price lists '*Eureka*,' and '*Improved Eureka*.' As buyer for the firm I make up the price lists, and had no particular reason for using the word '*Eureka*,' except that fancy names were then very fashionable, and as applied to shirts it was a name universal in the trade. I knew that *Ford* was using it at that time. I had at that time (1862) seen the advertisement of *Ford's Eureka Shirts* in his window. *McIntyre, Hogg, & Co.* used the term in 1862. I do not know anyone else who used the term. The shirts were made to our order from samples submitted to *McIntyre, Hogg, & Co.* by us. They delivered them to us from the first as *Eureka* shirts. Some member or buyer in that firm recommended me to call the shirts *Eureka*, and I did so. They got the stamps printed and attached them before they delivered the shirts to us. The stamp was designed by the printer. *Eureka* shirts had not been much demanded before that time. The price list of 1863 contains an advertisement of shirts 'of *Eureka* and *Cuirass* shape.' '*Eureka*' is a word that has been used for twelve years for scarves. The improvement in *Eurekas* referred to in the price list as 'Improved *Eureka*' referred to improvements in the wristbands, and so on."

Mr. *Hogg*, a member of the firm of *McIntyre, Hogg, & Co.*, shirt manufacturers, confirmed this statement.

The Defendants also produced evidence to shew that in the year 1854 a person named *Ford*, a relative of the Plaintiff, sold shirts which he called "*Eureka*" on the boxes and invoices, for about a year, with the knowledge of, and without any interference from, the Plaintiff; also that a shirt-maker named *Stroud*, whose shop was within a few doors of the Plaintiff's, had for several years before the filing of the bill sold and advertised shirts as "*Stroud's Eureka Shirts*," and had exhibited a board in front of his shop with those words conspicuously painted on it.

The Defendants also proved that the Plaintiff had been in the habit of printing invoices and bill-heads in which he had described

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himself as "patentee" of *Ford's Eureka Shirts,* and they also produced advertisements which appeared in the year 1864 in the *Standard* and other newspapers, and in the *Cornhill Magazine,* which were headed "*Ford's Eureka Shirts,*" and ended with the words "*Richard Ford & Co.,* patentees."

In reply to this evidence the Plaintiff stated that he first adopted that form of invoice in 1857 or 1858, and that those invoices were never sent with the goods to the purchaser, but were inclosed in a distinct envelope. He also stated that he had never publicly advertised his shirt as patent, although he had advertsied himself as a patentee, being the patentee of the *Mimema Shirt;* that no price list of his contained any statement that the *Eureka* was a patent shirt, or that the Plaintiff was the patentee of the *Eureka Shirt;* and that the word "patentee," as applied to *Eureka* shirts, had now been withdrawn from his bill-heads and invoices.

In one of his later affidavits the Plaintiff exhibited the cover of one of his shirt boxes, on which was printed in large letters the following notice: "Caution! Caution! *Ford's Eureka Shirts!* As other shirts are sold as '*Ford's Eurekas,*' please observe none are genuine unless stamped with the trade mark inside the collar."

Under these circumstances the Vice-Chancellor was of opinion that the Plaintiff had not made out his claim to the use of the name "*Eureka*" as a trade mark; and also that he had disentitled himself to relief in this Court by falsely calling himself a patentee. He accordingly dismissed the bill with costs (1).

(1) 1872. Jan. 18. WM/1872/12.

SIR JAMES BACON, V.C.:—

It appears to me that very little of the evidence that has been adduced in this case has any direct application to the question before the Court.

As for the cases that have been cited, I will make this observation: the cases upon trade marks will, in the decision of them, necessarily extract from the Judge, whoever he may be, a variety of observations which he intends only to apply to the case before him, but which, by the generality of the expression, may be thought to lay down some general rule. The law upon the subject of trade-marks has been the same for a great many years. It has undergone no change that I know of. A more strict definition perhaps of trade marks is contained in the 1st section of the *Merchandise Marks Act,* 1862 (25 & 26 Vict. c. 88) than had ever been before expressed in terms so authoritatively; but the same thing has at almost all times existed, and the same law, according to my notion, has at all times been applied.

The meaning and use of a trade mark is, that some person dealing in

Mr. *Little*, Q.C., and Mr. *Caldecott*, for the Plaintiff:—

It is undisputed that the Plaintiff invented this shape of shirt and gave it the name of *Eureka;* that from the beginning he marked his shirts with that mark, and that he has spent large

goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it as that no man may imitate his mark, and the legal right goes no further than that.

The cases, as I have said, establish that. The recent statute does the same thing in more distinct terms. [His Honour then referred to the statute, and continued :—]

This bill is a bill to establish the Plaintiff's right to his trade mark, and the first question, and that which must govern the decision of the case, is, What is his trade mark, and what has he pleaded as being his trade mark ? Now the bill, which is very clear and distinct, asserts that in the year 1849 he brought out a shirt, which he describes, and gave to the shirt so brought out, made, and sold by him, the name of "*Eureka*." From 1849 to the present time he has advertised that, and done a valuable and extensive business ; and ever since the year 1849 sold, and is now selling, the shirt under the mark or title of "*Eureka*," and has gained a valuable reputation ; and he says that that shirt has been, since the year 1849, and is now, known in the trade and to the general public as the "*Eureka*" shirt ; and then he alleges that he has always marked his said shirts on the inside, at the back of the collarband thereof, with the following mark : "*R. Ford's Eureka Shirt, London.*"

Upon those allegations the whole case made by this bill is and must be, according to the facts proved, not to restrain the Defendants from using the trade-mark in which the Plaintiff's right consists, but to restrain the Defendants, according to the frame of the prayer, from applying the mark or title of "*Eureka*" to any shirts manufactured by the Defendants, and from issuing any boxes, cards, or price or trade lists, or other advertisements, on which the mark or title "*Eureka*" shall be applied.

Now, what is there to justify that ? The Plaintiff's assertion is in effect this : "From the time that I invented the shirt that I called by the name of '*Eureka*' I have always protected such right or property as I have in it by putting upon it the inscription '*R. Ford's Eureka Shirt, London.*'" There is no pretence for saying that the Defendants have ever imitated or copied that inscription. They have adopted the name "*Eureka*," and it is suggested in the Pleadings, but, as I think, not properly suggested, that that is an invasion of the trade mark. But what is the Plaintiff's case about this ? From the year 1849, when he brought out this shirt and gave it the name "*Eureka*," it is proved in evidence, clear, conclusive, and without an attempt at contradiction, that it has been well known to the trade as the "*Eureka*" shirt, and that without reference to any right the Plaintiff had at all. But what further does the Plaintiff say ? Over and over again in the course of the argument it has been said that the Plaintiff does not seek to shut up the Defendants' mouth. "They may call it '*Eureka*' shirt if they like, they may sums in advertising them. The words "trade mark," which were added afterwards, were not essential parts of the trade mark. The evidence of the Defendants fails to shew that from 1849 to 1862

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make it of the identical shape, but they shall not mark it." Why not? If they have a right to make it, by what name are they to call it? Nobody has ever called it anything but the "*Eureka.*" And if they may call it so in words, why may they not stamp upon a shirt when they have made it that name by which they and all the rest of the world call it? There is one thing, and one only, they must not do: they must not say that this *Eureka Shirt* which they offer for sale is "*Ford's Eureka Shirt.*"

The case really, without referring to all the abundant evidence that has been gone into, reduces itself to the narrowest possible proportions and is of the plainest kind. The use of the name is not claimed by the bill, except in the way I have pointed out. It cannot be claimed as a matter of fact. "*Eureka*" is not the trade mark; and where is the case to prove or establish that taking one word out of the trade mark will be an invasion of the trade mark? From 1849 to 1860 these Defendants had nothing to do with it, but it is in evidence that other persons did make *Eureka* shirts, and did sell them commonly. Whether they stamped them or not is not clearly in evidence. If they did, in my opinion, they did no more than they were justly entitled to do; if they did not, the omission to stamp them cannot better the Plaintiff's case. [After some further remarks on the facts proved in the case, His Honour continued:—]

Then it has been argued that it is not necessary there should be any proof that any one has been misled by the use of the word "*Eureka*" by the Defendants. If it is not, it is at least necessary to shew that it was "calculated" in the words of the bill "to mislead." But is it calculated to mislead? When for nearly twenty years before the filing of the bill the Plaintiff has taken pains, and successful pains, to tell the whole world that his "*Eureka*" shirt bears his trade mark upon it, what reason is there for me to believe that anybody could possibly be misled by seeing a shirt upon which was only the single word "*Eureka?*" If "*Eureka*" had been a separate and distinct trade mark, that would have been different. But under these circumstances how can I, with any kind of justice, infer that the word "*Eureka*" being printed in a small escutcheon and stamped upon the neck of a shirt, would lead anybody to believe that it was *R. Ford's* "*Eureka*" shirt?

Upon the ground, then, that he has permitted the public to use and make this shirt, and that this shirt has but one name, and cannot properly be called by any other name than that which he himself has given to it, I think he has no right whatever to complain against the Defendants. I think that the public use of it during that time, under the circumstances proved, has precluded him, if he could do so upon any other ground, from claiming the exclusive use of the single name "*Eureka.*"

I bear in mind that when this matter was discussed at length in this Court, and when the Plaintiff was heard at full length before the Lord Justice *Giffard*, the Lord Justice said that there were two questions which whenever the cause came to be heard will deserve serious attention. One is the public use, and upon that, in my opinion, the evidence is overwhelming. The use any one but the Plaintiff used the word as a mark on shirts; but in 1862 the Defendants adopted it, and in 1863 they issued a circular in which they spoke of shirts "of the *Eureka* and *Cuirass*

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has been public, and I do not hesitate to say, to my satisfaction it has been proved to be a public use with the knowledge of the Plaintiff.

There remains only the other question to consider, that of the patent. Now I should not like to fritter away that wholesome doctrine of the Court, that if a man comes here invoking the aid of a Court of Equity for the protection of what he calls a legal right, he is bound to shew that he has dealt honestly with that right. Is there any honesty in this instance? Mr. *Caldecott*, with great ingenuity, and also I may say with great candour—for he has not permitted his ingenuity to overstep the candour which always characterizes anything he has to say to the Court—has endeavoured to distinguish those authorities. He says it was not until 1857 that the Plaintiff lapsed into this practise of calling himself a patentee, and he says that, the Plaintiff's conduct having been "pure" up to a certain time, it cannot be rendered impure by his subsequent conduct. I admit no such principle as that; for if I were to say that that was to be the rule of the law, as far as I have to declare the law, it would only be necessary for a man one day to stamp his shirt with a trade mark, and the next day or the next week to say to the world, "that is my trade mark, I will sell you these shirts, and when I sell them to you I give you a bill of parcels, and tell you upon it that I am the patentee of that shirt which bears that trade mark." How can I establish such a principle as that a man is at liberty at any time he likes to say to the public, "I am a patentee?" What is the consequence of his so saying? Suppose a buyer of shirts under one of these invoices were greatly struck with the beauty and excellence of the shirt. He might say to himself, "If I were at liberty to make these shirts I could make them on better terms than this man sells them to me, but I dare not, because he is the patentee; I am precluded; he has an exclusive right." It is a positive assertion, from the year 1857 at least, that Mr. *Ford* is the patentee of that shirt, the distinctive property in the sale of which is vested in him, and to which his title deed is that stamp which he has put upon it. If the rule were a too strict one it is too well established for me to meddle with it. But I think it is founded upon the most perfect good sense and justice. I think that persons ought not to be at liberty to hold themselves out as being patentees when they have no such right.

[His Honour then referred to *Millington* v. *Fox* (3 My. & Cr. 338) and *Kinahan* v. *Bolton* (15 Ir. Ch. 75), which cases he distinguished from the present, and continued :—]

I desire it to be understood that my decision of this case proceeds upon this, that the Plaintiff has not, and never had, any exclusive right to the word "*Eureka*" as a word; that as far as the word "*Eureka*" is inserted in his trade mark he has a right to that, but only as a part of his trade mark. That trade mark has never been in any degree interfered with or imitated, either by advertisement or representation, or otherwise, and therefore the Plaintiff has nothing to complain of in that respect. Then if he says that, in general, making *Eureka* shirts, and selling

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shape." The Plaintiff does not complain of the Defendant's making shirts of the "*Eureka*" shape, but of stamping them and advertising them as "*Eureka*" shirts, by which the public is liable to be misled. It is not necessary for the Plaintiff to prove that persons have been actually misled; the tendency to mislead is sufficient to sustain an action at law and to entitle the Plaintiff to relief in equity: *Sykes* v. *Sykes* (1); *Seixo* v. *Provezende* (2); *Flavel* v. *Harrison* (3); *Edelsten* v. *Edelsten* (4); *McAndrew* v. *Basset* (5); *Croft* v. *Day* (6). Although the Plaintiff has always appended his own name to the trade mark, calling the shirts "*Ford's Eureka Shirts*," that circumstance does not lessen his right to the exclusive use of the term "*Eureka*": *Braham* v. *Bustard* (7); *Millington* v. *Fox* (8); *Kinahan* v. *Bolton* (9); *Cocks* v. *Chandler* (10); *Hall* v. *Barrows* (11); *Ainsworth* v. *Walmsley* (12); *Wotherspoon* v. *Currie* (before the House of Lords, April 19, 1872)(a) No case of acquiescence has been proved against the Plaintiff. The use of the mark by *C. Ford* and *Stroud* are too insignificant to affect his right. The right of the Plaintiff being based upon property, such instances of acquiescence will not defeat it: *Johnson* v. *Wyatt* (13).

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them, is against any other right that he may possess, I say he is precluded from saying that by the conduct which he has pursued respecting his advertisements, and especially his bill heads; for there I say he has made a direct, wilful, and false representation, one which might have been injurious, which certainly would be inconvenient, to any person who might take his word for his being a patentee of the "*Eureka*" shirt, and therefore be deterred from making it himself. The advertisements in newspapers, the advertisements in the *Cornhill Magazine*, the advertisements, if they are to be so called, upon the invoices or bill heads, which go further than advertisements, for it is a transaction between the buyer and the seller, all that is, in my opinion, a clearly holding out and announcing himself to the public as a person whose right to sell the shirts which he thus sold, as mentioned in the invoices, was protected by a patent, and that that was false is abundantly proved.

Under these circumstances, I am of opinion that there is no ground whatever upon which this suit can be sustained. The bill therefore must be dismissed, and it must be dismissed with costs.

(1) 3 B. & C. 541.
(2) Law Rep. 1 Ch. 192. 12 Jur. N.S. 2
(3) 10 Hare, 467. [illegible]
(4) 1 D. J. & S. 185. 9 Jur. N.S. 479
(5) 12 W. R. 777. 10 Jur. N.S. 578
(6) 7 Beav. 84.
(7) 1 H. & M. 447.
(8) 3 My. & Cr. 338.
(9) 15 Ir. Ch. Rep. 75.
(10) Law Rep. 11 Eq. 446.
(11) 33 L. J. (Ch.) 204. 4 De G. J. & S. 1
(12) Law Rep. 1 Eq. 518.
(13) 2 D. J. & S. 18. 9 Jur. N.S. 13

(a) L.R. 5 H.L. Ca. 508

(11) S.C. 10 Jur. N.S. 55
(5) S.C. 4 De G. J. & S. 380

The only remaining point is the use of the word "patentee." But that word was not used in conjunction with the trade mark, and even if it had been, that circumstance would not have been sufficient to disentitle him to relief at law or in equity: *Sykes* v. *Sykes* (1); *Marshall* v. *Ross* (2). In *Pidding* v. *How* (3); *Perry* v. *Truefitt* (4), *Flavel* v. *Harrison* (5), and *Leather Cloth Company* v. *American Leather Cloth Company* (6), the misrepresentation was with respect to the article to be protected, and the Court refused to protect the sale of a thing which was in itself a fraud upon the public. That is not the case here. The misrepresentation was only collateral. Nor was there any misrepresentation at all to the public except in a few advertisements in 1864, and the Plaintiff has now ceased to use the words in his bill heads and invoices.

Mr. *Kay*, Q.C., and Mr. *H. A. Giffard*, for the Defendants:—

The name "*Eureka*" was originally a fancy name applied to a particular shape of shirt, not shirts made or sold by a particular trader; and as such it has become *publici juris*, and is used both by the trade and the public to designate that shape without distinction of the seller. Every one, therefore, has a right to use it, and the Court will not grant an injunction to restrain them any more than to restrain persons from advertising "Broughams," "Wellington boots," or "Harvey's sauce," all of which were originally fancy names. The Defendants never sold or advertised these shirts as "*Ford's Eureka Shirts*," which is the only trade mark to which the Plaintiff is entitled. Even though the name "*Eureka*" may have been originally a trade mark, it has now become *publici juris*, and the Plaintiff has lost his exclusive right by his acquiescence. He did not interfere with *C. Ford* or with *Stroud*, whom he knew to be openly selling shirts as *Eureka* shirts, and he must also have seen numerous price lists and trade circulars in which *Eureka* shirts were advertised. Under such circumstances the Court has always refused an injunction: *Canham* v. *Jones* (7); *Woolham* v. *Rat-*

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(1) 3 B. & C. 541.
(2) Law Rep. 8 Eq. 651.
(3) 8 Sim. 477.
(4) 6 Beav. 66.
(5) 10 Hare, 467. 17 Jur. 368
(6) 11 H. L. C. 523. 11 Jur. N.S. 513.
(7) 2 V. & B. 218.

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cliff (1); *Lee* v. *Haley* (2); *Wotherspoon* v. *Currie* (a); *Dent* v. *Auction Mart Company* (3); *Collins Company* v. *Brown* (4); *Browne* v. *Freeman* (5).

But whatever the Plaintiff's legal rights may be, he has disentitled himself from obtaining relief in this Court by the misrepresentation contained in his invoices and advertisements. If the Court granted an injunction it would be aiding the Plaintiff to commit a fraud: *Pidding* v. *How* (6); *Perry* v. *Truefitt* (7); *Morgan* v. *M'Adam* (8); *Eldelsten* v. *Vick* (9); *Lamplough* v. *Balmer* (before Vice-Chancellor *Wood*, December 3, 1867) (b). It is impossible to draw a distinction between a misrepresentation in the trade mark and elsewhere, and in some of the cases cited there was no misrepresentation in the trade mark.

Mr. *Little*, in reply.

SIR W. M. JAMES, L.J.:—

In this case the Plaintiff complains of the Defendants that they have invaded his trade mark. The Plaintiff's case is that he, being a shirt-maker in *London*, invented a particular form of shirt, to which he gave the name of "*Eureka*," and that he used as a trade mark, which he affixed to the shirts, the words "*Ford's Eureka Shirt*;" and he complains that he having used this trade mark for several years, the Defendants have used the word "*Eureka*," affixing it to a shirt in exactly the same place as the Plaintiff affixed his mark; and that they have also used boxes containing small quantities of shirts, just as much as one purchaser would buy, with the mark "*Foster, Porter, & Company's Improved Eureka*." Thus stated, the case seems to me *primâ facie* to be one of the plainest and simplest cases ever brought into Court. It seems to me to be utterly impossible to distinguish this case from the case of *Braham* v. *Bustard* (10), where a man had a trade mark upon which was the word "*Excelsior*," and another man applied the word "*Ex-*

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(1) 1 H. & M. 259.
(2) Law Rep. 5 Ch. 155.
(3) Ibid. 2 Eq. 238. 12 Jur. N.S. 447
(4) 3 K. & J. 423. 3 Jur. N.S. 929.
(5) 12 W. R. 305.
(6) 8 Sim. 477.
(7) 6 Beav. 66.
(8) 36 L. J. (Ch.) 228.
(9) 11 Hare, 78.
(10) 1 H. & M. 447.

(a) L.R. 5 H.L. 508
(b) W.N. (1867) 293.

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celsior" to white soft-soap; or from the older case of *Millington* v. *Fox* (1), where persons used the name of *Millington* as part of the mark upon some steel; or from the case, in *Ireland*, of *Kinahan* v. *Bolton* (2), with respect to the use of the initials "*L. L.*" in "*Kinahan's L. L. Whisky*," which the Defendant endeavoured to invade by calling his whisky "*Bolton's L. L. Whisky*." The Plaintiff makes this *primâ facie* case—that he has a plain trade mark, a material and substantial part of which has been taken by the Defendants. Then the onus is, under those circumstances, cast upon the Defendants to relieve themselves from that *primâ facie* liability. Their defence consists in substance of two parts. One is that the word "*Eureka*" had become *publici juris*—that it had ceased, in fact, to be part of the Plaintiff's trade mark, or essential to any trade mark; that it had become a word like "Wellington" as applied to boots, descriptive, not of the Plaintiff's shirts, but descriptive of a form of shirt, and that it was known in the market and to all the public as the name and description of that particular form.

Now, in considering the question as to whether or not it is *publici juris*, I think it is important to regard a little the history and chronology of the case. [His Lordship then referred to the evidence the effect of which is stated above, particularly to the affidavits of Mr. *Walton* and Mr. *Hogg*, and continued:—] It appears to me to be clearly made out that, at the time when one of the Defendants' shirts was sent to *McIntyre, Hogg, & Co.* by the Defendants, and shirts were made by *McIntyre, Hogg, & Co.* for them of the *Eureka* shape, and up to that time, there was not any use of the word "*Eureka*" as applied to shirts in any sense whatever in the market. There was, during an interval—I think during one year, the year 1854—a relation of the Plaintiff of the name of *Ford*, who seems to have sold shirts (it does not appear whether they were marked or not) as "*Ford's Eureka Shirts*," and he was not, apparently, interfered with by the Plaintiff. That however, did not last for more than a year, and whatever wound that might have inflicted upon the Plaintiff's property, it appears to me that must be considered to have been entirely healed long before this transaction of the Defendants' took place. With the exception of that, so far as the evidence goes, it appears that

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(1) 3 My. & Cr. 338.

(2) 15 Ir. Ch. Rep. 75.

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not a single shirt had ever been advertised, or marked in such a way as to get into the hands of the public, with the name "*Eureka*." It is in evidence that the shape itself became from the first very popular, and that a great number of persons used the shape, as they lawfully might; and to some extent it appears that, as between the shirt-maker and his cutters, as between persons engaged in the trade, with regard to whom the use of the word would not be calculated to deceive, the word "*Eureka*" was used. A man might say, "I want one hundred dozen *Eurekas*," or he might say, "I want one hundred dozen *Fords*"—that is to say, between them that signified so many dozen shirts made after the pattern of Mr. *Ford's* shirts, which was perfectly lawful; but at the time when the Defendants began their operations it does not appear to me that there was any use of the word "*Eureka*" as between any seller and any ordinary buyer, or that there was anything whatever which tended to shew that the word "*Eureka*" meant at that time anything but the shirt manufactured by the Plaintiff himself. That was, in my judgment, the state of things at the time when the piracy by the Defendants began; and I think it is to be lamented that Mr. *Walton* and Mr. *Hogg* did what they did—that is to say, used the word *Eureka*, and stamped that word in exactly the same place as that in which the Plaintiff placed his trade mark. They did that apparently with an unconsciousness—as they *naïvely* disclose in their evidence—that it was a most improper attempt to obtain the benefit of the reputation which Mr. *Ford* had acquired for his shirts by the merit of the manufacture itself, and by his persistent and expensive advertisement of it in all parts of the kingdom. At all events it was, in my judgment, a most improper violation of the Plaintiff's right at that time, and if the Plaintiff had then discovered it, and had then filed his bill to restrain the use of that word "*Eureka*" by the Defendants, he must have succeeded in his suit. Then what has occurred since? A great deal of evidence has been given as to the common use of the word "*Eureka*"; but if we eliminate from that mass the evidence of the use of the word which is to be traced directly to the operations of the Defendants themselves—the use of it by the persons who are the shopkeepers who have bought from the Defendants, the use of it by shippers

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who have bought from the Defendants for the purpose of shipping to the colonies, where the *Eureka* shirts seem to be in request—it appears to me that the evidence of the use of the word *publici juris* is reduced to a very small amount indeed. It is not to be overlooked that, with the single exception of *Stroud*, who for the last year or two is proved to have put over his door "*Stroud's Eureka Shirts*," where the evident intention to distinguish his shirts from *Ford's Eureka Shirts* might, perhaps, have made it difficult to interfere with him, there is no evidence that in the whole of *London* there has been any use of the word "*Eureka*" in such a way as to affect the question before us by any person whatever except the Defendants. It has been said that one murder makes a villain and millions a hero; but I think it would hardly do to act on that principle in such matters as this, and to say that the extent of a man's piratical invasions of his neighbour's rights is to convert his piracy into a lawful trade. That ground of defence, therefore, in my judgment, fails.

The next and more difficult point, in my judgment, is that which is clearly proved in this case, that the Plaintiff himself has been guilty of misrepresentation with respect to his trade, not indeed in the trade mark itself nor in the manufacture, but by several collateral representations. He has by advertisements, extending over the year 1864, in several publications, and, which is more important, in every invoice, which he gave to every purchaser, for several years described himself as patentee of this shirt. That is to say, he has represented that in addition to the protection of the trade mark, his article is protected by patent.

There have been several cases in this Court in which that misrepresentation has been held to be to some extent fatal to a Plaintiff's case. In *Pidding* v. *How* (1), the case of the *Howqua Mixture*, in *Perry* v. *Truefitt* (2), which was the case of the *Mexican Balm*, in *Flavel* v. *Harrison* (3), which was the case of a patent kitchener, and in the *Leather Cloth Company* v. *American Leather Cloth Company* (4), the Judges held that the misrepresentation debarred the Plaintiff from the relief which he then sought. But Mr. *Little* has drawn our attention to this important consideration,

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(1) 8 Sim. 477.
(2) 6 Beav. 66.
(3) 10 Hare, 467. 17 Jur. [illegible]
(4) 11 H. L. C. 523. 11 Jur. N.S. 513.

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that in most of these cases the fraud was in the trade mark itself, and further, that in the cases of *Pidding* v. *How* (1), *Perry* v. *Truefitt* (2), and *Flavel* v. *Harrison* (3), the Master of the Rolls and the Vice-Chancellor *Wood*, the present Lord Chancellor, thought that the proper course to pursue was to retain the bill for a year, with liberty to the Plaintiff to bring such action as he might be advised, thereby implying, as it seems to me, that if he succeeded in his action he would come back to this Court and be entitled to the injunction, which would be the ancillary remedy which this Court gives for the further protection of his legal right. That course is not open to us now. We are obliged to determine both the legal right and to apply the equitable remedy which is the result of that legal right.

Now in this particular case I am satisfied, for reasons which the Lord Justice *Mellish* will go into more fully than is necessary for me to do, that this collateral misrepresentation of the article being protected by patent would be no defence at law, and we are satisfied that we ought to determine the legal right in his favour; and the legal right being so determined in his favour, we think he then is in the same position as if in the cases which I have referred to he had gone to law and had succeeded in the action. I am of opinion, therefore, that having determined the legal right which he has established to be in him he is entitled to the ancillary equitable remedy, that he is entitled to an injunction, very much in the same terms as that which was granted in *Millington* v. *Fox* (4), an injunction to restrain the Defendants from using the word "*Eureka*," or any other part of the trade mark of the Plaintiff to any shirts manufactured by them, or to any shirts sold by them, unless such shirts were manufactured by the Plaintiff, and from issuing boxes, cards, or labels on which the mark "*Eureka*" shall be applied to shirts not of the Plaintiff's manufacture. I do not think it right to extend the injunction to price lists or trade circulars, or other advertisements of that kind, because the fraud that is committed is a fraud that is committed with respect to the ultimate purchaser. The trade circulars and the price lists are things between the Defendants or the manufacturers and the shopkeepers or other dealers, who are not deceived by them, and what is important is, not to restrain the parties, who know exactly what they are dealing in and what they are talking about, from the use of the word "*Eureka*," which they may fairly and honestly use to describe the thing or shape itself, but from their doing that in such a way as to induce an unwary or ignorant purchaser to believe that the thing he is getting is the article manufactured and advertised by the Plaintiff.

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(1) 8 Sim 477.
(2) 6 Beav. 66.
(3) 10 Hare, 467. 17 Jur 368
(4) 3 My. & Cr. 338.

The question remains as to what ought to be done with respect to the account. Having regard to the fact that we are establishing a legal right, that we are also giving an equitable remedy ancillary to and consequent upon that legal right, and having regard to the fact that the Plaintiff did certainly make a misrepresentation, which he was not justified in making, in his advertisements and invoices, and also to the fact that the Plaintiff seems to have been not very vigilant in endeavouring to ascertain who were interfering with his trade mark, and having regard also to the probability that the extent of the trade of the Defendants would by no means be a measure of the injury done to the Plaintiff himself, because the Plaintiff does not appear to have anything like the extent of the trade of the Defendants; having regard to all these circumstances, we are of opinion that the account should not be earlier than the filing of the bill. The Plaintiff will therefore be declared to be entitled to the ordinary account from the filing of the bill, with the costs of the suit.

Sir G. Mellish, L.J.:—

I am of the same opinion. When this case was before Lord Justice *Giffard*, on the hearing of the appeal with respect to the motion for injunction, he said: "There are two very serious questions for decision at the hearing; the one is, whether the evidence can be brought to such a point as to make out that '*Eureka*' is *publici juris*. . . . The other very serious question is, whether the Plaintiff is or is not precluded from suing by reason of his having described himself in his invoices to a very considerable extent as patentee of '*Ford's Eureka Shirts*,' when in fact he is not the patentee of those shirts."

I am of opinion that the Lord Justice *Giffard*, in those expressions, very correctly described the two questions which have to be decided in this case; and I think the mode in which he expressed himself as to the word "*Eureka*" proves that he did not concur in the opinion which the Vice-Chancellor has given, that because Mr. *Ford* always put his own name before the word "*Eureka,*" therefore he could not be entitled to the word "*Eureka*" as his trade mark, and that he could have no protection against anybody who used it unless that person also used the name of *Ford.* For the reasons given by the Lord Justice *James,* which I do not repeat, I am clearly of opinion that originally, at any rate, the Plaintiff was entitled to be protected against the use of the word "*Eureka*" by the shirt-makers as a violation of his trade mark.

Then the question is, has it become *publici juris?* And there is no doubt, I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris,* as in the case which has been cited of *Harvey's Sauce.* It was admitted that, although that originally had been the name of a sauce made by a particular individual, it had become *publici juris,* and that all the world were entitled to call the sauce they made *Harvey's Sauce* if they pleased. Then what is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become *publici juris?* I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone.

Therefore I have examined the evidence in this case for the purpose of determining whether the use of the word "*Eureka*" has become *publici juris* in that sense, and I have come to the conclusion upon the whole, that as between the wholesale dealer and the retail dealer it has to this extent become *publici juris*, that by the use of it in the trade circulars, which are issued only to retail dealers, or by the shirts being invoiced by the wholesale dealers "*Eureka Shirts*," no retail dealer would be likely to be deceived or to buy shirts which were not made by *Ford* believing they were *Ford's* shirts. But I have come to the conclusion that a very considerable portion of the public, who buy the shirts for the purpose of wearing them, are still very liable to be deceived by the use of the word "*Eureka*" as a mark on the shirt itself, particularly when it is affixed in the very place where Mr. *Ford* has been accustomed to place his mark. And the reason why I come to that conclusion is principally this: Mr. *Ford* is the only person who has ever advertised these shirts as "*Eureka*" shirts, and who has ever advertised that he marks them in that particular place. There is evidence that, to a very large extent, indeed for a series of years, Mr. *Ford* has advertised that he marks his shirts in a particular part of them, and that none of them, except those that are marked "*Ford's Eureka Shirts*" are genuine.

Then, no doubt, it is said that he has always put "*Ford's Eureka Shirt*," and that would prevent the public being deceived. I cannot think that that would be its practical effect. It is quite obvious that, although he puts the word "*Ford*" to it for the purpose of inducing people to come to him, yet a very large number of persons who read these advertisements would be attracted by and would remember the word "*Eureka*" who would wholly forget the word "*Ford.*" And persons who had been accustomed to buy these shirts marked "*Ford's Eureka Shirt*," and persons who had been accustomed to read his advertisement and see that the shirts were extensively advertised as "*Ford's Eureka Shirts*" when they came and saw in a shop, either in this country or in the colonies, marked as the Defendants' shirts are marked, "*The Eureka Shirt*," they would not necessarily remember the name of *Ford*, but they would suppose that these were the advertised shirts which had obtained such celebrity. There can be no doubt that there are many persons who, if there were no difference as regards the fit of two shirts, would prefer buying a shirt from the original maker, and the word "*Eureka*" marked upon a shirt would be calculated to make such persons believe that it was made by the man who originally found out and advertised the "*Eureka*." I am, therefore, of opinion on the first point that the trade mark has not been made so *publici juris* as to debar the Plaintiff from maintaining his suit.

Then comes the second question, as to whether he is prevented from having any relief in this Court on account of the misrepresentation he has made, partly, although not very extensively, by public advertisements, and to a very great extent by his bill heads, that this was a patented article, when in truth it is not. Now it becomes necessary on this part of the case to consider first whether an action at law would lie in this case; and secondly, if an action at law would lie, whether the Plaintiff ought to have any relief in equity.

In the first place it is quite clear that this is not like the case of *Millington* v. *Fox* (1), where the Defendant was a totally innocent person, and where no action at law would lie, because the Defendant was not guilty of wilfully taking the Plaintiff's mark. This is a case which is exactly like *Sykes* v. *Sykes* (2), which is always cited as to the common law right to maintain actions of this kind, and where it was expressly held, that, although the retailer purchasing the article is not deceived, yet if a trade mark is put upon that article for the purpose of deceiving the persons who purchase from the retail dealer, an action at law will lie. This is, in my opinion, a case of that kind, and it is therefore one in which an action at law *primâ facie* could be maintained.

Then would it be a defence to that action at law that the Plaintiff has made false representations to the public that his article was patented when in fact it was not? If the false representation was in the trade mark itself, although I cannot find that that point has ever been decided or raised in a Court of Common Law, yet I am disposed to think, and indeed I have a pretty clear opinion, that if that question were raised it would be held that the fact of the trade mark itself containing a false representation to the public would be an answer at law to an action brought for a deceptive use of the trade mark by the Defendant. The declara-

(1) 3 My. & Cr. 333.

(2) 3 B. & C. 541.

tion at law always begins by setting out that the Plaintiff had used for a length of time a certain particular trade mark, and that his goods were known by that trade mark, and it substantially sets up that by the user of that mark, and his goods being known in the market by it, he has practically got a right to the use of that mark. It appears to me that it would come within the rule *Ex turpi causâ non oritur actio;* that if the trade mark contains a false representation calculated to deceive the public, a man cannot by using that, which is in itself a fraud, obtain—I do not say an exclusive right—but any right at all. I may observe that *Sykes* v. *Sykes* (1) is the only case in which the article was described as a patent article. The word "patent" was in the trade mark: the article was called "*Sykes' Patent,*" but in that case there had been originally a patent, and there was no imputation that there was any fraud in the use of the word. All the world might know that the patent had expired. The word was simply used as a description of the article. The same reasoning would apply if the trade was a fraudulent trade. In that case also I have no doubt that no action could be maintained. In *Perry* v. *Truefitt* (2) and *Pidding* v. *How* (3) there was very good reason for supposing that the trade itself was a fraud. The object of the trader in *Perry* v. *Truefitt* was to sell under the name of "*Mexican Balm*" some composition which never came from *Mexico*, but which was said to be composed from some wonderful herbs to be got only in *Mexico.* So in *Pidding* v. *How* there was evidence that the object was to persuade the world that the tea which was called "*Howqua's Mixture*" was an extraordinary mixture, made up by some great man in *China*, when in point of fact it was made in *England.*

It resembled a case which I remember being tried at *York*, where there was a question respecting the sale of some Peruvian guano, which was proved to be a manufacture made at *Hull.* A number of witnesses stated that everybody in the trade knew that Peruvian guano, unless the words "Genuine *Gibbs*" were added, meant an article made in this country; but they could not deny that when a farmer bought some to put on his fields, he thought he was buying guano from *Peru.* In that case, the sale was held to be a gross fraud, and there is no doubt that no right

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(1) 3 B. & C. 541. (2) 6 Beav. 66. (3) 8 Sim. 477.

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could arise out of it. But where the trade is, as in this case, a perfectly honest trade, and where the trade mark is, as in this case, a perfectly honest trade mark, I am clearly of opinion that there is no common law principle upon which it is possible to hold that the fact of the Plaintiff having been guilty of some collateral fraud would be an answer to an action. It would be impossible to plead at law as a justification for the Defendants' committing the fraud that the Plaintiff had committed a fraud on some one else. Such a plea would be no answer to the action. It is true that in this case the bills containing this false representation as to its being a patented article are proved to have been given to the Defendants themselves; but there is not the slightest evidence or the slightest reason for supposing that the Defendants were ever deceived by that representation because they knew perfectly well that there was no patent for these shirts. There would be this further difficulty to be solved: How much misrepresentation must be made to be an answer to an action? Is it to be said that if the Plaintiff had on one single day issued an advertisement containing a false representation, therefore all his rights were gone? I can see no way of determining how far the misrepresentation must extend before it would be considered an answer to an action or a suit.

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I am therefore of opinion that an action at law could have been maintained in this case. And we are in the same position now as if, before *Sir John Rolt's Act*, which altered the rule of this Court, an injunction had been refused with leave to the Plaintiff to bring an action at law, and that action had been tried and a verdict obtained for the Plaintiff, and the Plaintiff were now before the Court asking for his injunction. Now, is the injunction to be granted or not? It appears to me in this case that the injunction must be granted, unless it can be held that it is a case in which a Court of Equity would grant an injunction to restrain the Plaintiff's action; because it cannot be right, if the Plaintiff is allowed to maintain his action, that he should be obliged to bring perpetual actions at law instead of having his injunction in this Court.

The only question therefore remaining is, Would a Court of Equity, on account of his false representations, restrain the action

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at law? I know of no authority for that. On the contrary, in all these cases in which the Court has refused an injunction on the ground of misrepresentation, it has allowed an action at law to be brought if the party chose to bring it. All the authorities tend in that direction, and seem to hold that if an action at law will lie there will be a remedy in this Court by injunction. Indeed I do not see what equitable right the Defendant could have to restrain such an action. He is simply a person who has committed a fraud himself, and who has no equitable right whatever, and the only decision which can be cited as an authority is the *Leather Cloth Company* v. *American Leather Cloth Company* (1), where, no doubt, Lord *Westbury* and Lord *Kingsdown* appear to say that false representations of this kind might be an answer to a suit in equity. But that was plainly a case where the misrepresentation was in the trade mark or label itself, and I have carefully read through the judgments of Lord *Kingsdown* and Lord *Westbury*, and it appears to me that they had simply that question before them, and they had not at all present to their minds the question which we have to decide, namely, whether a collateral misrepresentation would be an answer to an action at law; and if it be not an answer to an action at law whether it could be an answer to a suit in equity. I have therefore come to the conclusion, on the second ground also, that it constitutes no reason why the Plaintiff should not maintain a suit in this Court.

I entirely agree in what has been said by the Lord Justice that having regard to the fact that the Plaintiff has to a certain extent slept on his rights, and having regard to the misrepresentation which he has made, he is not entitled to what is the peculiar remedy of this Court, and which can only be got in equity, namely, an account for the last six years previously to the filing of the bill of the profits made by the sale of shirts by the Defendants with his trade mark upon them. If this action had been tried before a jury I am quite confident that upon this evidence he would only have recovered 40s. damages. There is no evidence of specific loss, and therefore a Court of Law would have looked upon it as an action brought to try the right, and the Plaintiff would only have recovered nominal damages; and I think that he

(1) 11 H. L. C. 523. 11 Jur N.S. 513.

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is not entitled to any account which would enable him to recover sums in equity which he could not have recovered at law.

SIR W. M. JAMES, L.J.:—

The form of the injunction will be "to restrain the Defendants from applying the mark or title of '*Eureka*' to any shirts manufactured by them or to any shirts sold by them, unless manufactured by the Plaintiffs, and from selling any shirts already marked with the mark and title '*Eureka*,' unless such mark or title has been applied with the sanction of the Plaintiff; and from issuing any boxes or packages on which the mark or title of '*Eureka*' shall be applied to shirts not of the Plaintiff's manufacture; and from affixing or using any label or card or other mark containing the word '*Eureka*' to or upon any shirts not of the Plaintiff's manufacture." That leaves them at liberty to advertise the name as between themselves and the trade; and then there will be an account as prayed in the bill, but limited to the period since the filing of the bill.

Solicitors for the Plaintiff: Messrs. *Edmands & Mayhew.*

Solicitors for the Defendants: Messrs. *Phelps & Sidgwick.*

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HAYWARD *v.* PILE.

[1865 H. 166.]

Practice—Revivor—Death of Sole Plaintiff after Decree—Order to proceed without Representative of Plaintiff—15 & 16 *Vict.* c. 86, s. 44.

A tenant for life, the sole Plaintiff in an administration suit, died after decree, an arrear of income remaining due to him. He left a will, appointing an executor; but the executor died without proving the will.

The Court, on the application of one of the Defendants, made an order to revive the suit against the other Defendants, without any representative of the original Plaintiff, but without prejudice to any application by a personal representative of the original Plaintiff to intervene.

IN this case the bill was filed by a tenant for life, as sole Plaintiff, against the executors and residuary legatees of a testator, for the administration of his estate. The common decree for administration was made in 1866, under which the accounts had been taken. Before the certificate of the Chief Clerk was signed the Plaintiff died, having by his will appointed *J. B. Black* his executor. *Black* did not prove the will; and in November, 1871, *J. Young*, who was one of the residuary legatees, obtained an order from the Master of the Rolls, under the 44th section of the *Chancery Improvement Act*, appointing *Black* representative of the Plaintiff's estate for the purpose of the suit, and reviving the suit against the other Defendants and *Black*.

Before the order was drawn up, it was ascertained that *Black* died a few days before the application was made; and as no person took out administration to the estate of the Plaintiff, *Young* made a fresh application to the Master of the Rolls to appoint the solicitor of the suitors' fund to represent the estate of the Plaintiff instead of *Black*, and for an order to revive the suit.

The Master of the Rolls felt a difficulty in making the order, and requested that the case might be mentioned to the Lords Justices.

Mr. *Bevir* accordingly now renewed the application before the Lords Justices on behalf of *Young*. He referred to *Bliss* v. *Putnam* (1); *Joint Stock Discount Company* v. *Brown* (2); *Dean of Ely* v. *Gayford* (3). He stated that the interest of the Plaintiff had not entirely ceased, as a balance of income was due to his estate, as well as his costs.

The LORDS JUSTICES made the following order:—

That this suit do stand revived at the suit of the said *J. Young* against the other Defendants, and be in the same plight and condition as the same was in at the time of the abatement thereof; and that this suit do proceed in the absence of the personal representative of the deceased Plaintiff; but this order is to be without prejudice to the personal representative of the late Plaintiff, when constituted, applying to this Court for liberty to intervene.

Solicitors: Messrs. *Wood, Street, & Hayter.*

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(1) 29 Beav. 20. 7 Jur ns 512. (2) Law Rep. 8 Eq. 376.
(3) 16 Beav. 561.

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June 6, 7, 21.

Ex parte FISHER. *In re* ASH.

Act of Bankruptcy—Bill of Sale—Assignment of all Debtor's Property—Fresh Advance.

8 Ch 49
16 Eq 464
9 Ch 274-5,
9 QB 20, 23
2 CCR 111-5
26 Eq 750-4
1 Ex D 64.
2 Ch D 256-9
260-1, 3-4, 5,
4 Ch D 683.
13 Ch D 102
104-5-6
109, 116.
13 Ch D 245
247-8, 250-1
18 Ch D 38
22 Ch D 793
23 Ch D 635-6
641

Where a sum of money is advanced upon the faith of a promise by the debtor to give a bill of sale of his property, the sum so advanced is to be considered as advanced upon the security of the bill of sale; but in such a case the promise must be an absolute one.

Where a debtor on the eve of bankruptcy assigns all his property to a creditor to secure a past debt as well as a fresh advance, the smallness of the fresh advance, although not necessarily making the assignment an act of bankruptcy, is strong evidence that the advance was made, not to enable the debtor to continue his trade, but to secure the past debt.

A trader applied to a creditor, who had previously advanced him £600, for a further advance of £100, which was accordingly made on the debtor giving a conditional promise that if he did not repay the £100 within ten days he would make an assignment of all his property to the creditor to secure both the past and fresh advance. Default was made in payment, and the assignment was executed. Shortly afterwards the debtor became bankrupt, and the property was sold for about £700:—

Held (reversing the decision of the Chief Judge in Bankruptcy), that, having regard to the conditional nature of the promise and the smallness of the fresh advance, the assignment was an act of bankruptcy and void against the creditors.

THIS was an appeal from an order of the Chief Judge in Bankruptcy declaring that a certain deed of assignment, dated the 27th of October, 1871, was valid against the trustee of the bankruptcy of *John Ash*, and that certain household furniture was not in the order and disposition of the bankrupt.

John Ash was formerly in partnership with *E. C. Griffiths* as millers, near *Newport*, in *Shropshire*, and the firm having become bankrupt *Ash's* household furniture was purchased by his brother-in-law, *James Wells*, who permitted *Ash* and his family to have the use of it. The circumstances under which *Ash* afterwards executed the deed of assignment were stated in the affidavit of *James Wells*, the assignee, as follows:—

"In or about the month of February, 1871, the said *J. Ash* informed me that *Sansbrook Mill* would be to let, and that if he could take the same and recommence business he would be able to obtain the trade of the best customers of the late firm of

Griffiths & Ash, and asked me to lend him sufficient capital to commence business. I then had great confidence in the said *J. Ash*, and for the sake of his wife, and after asking time to consider it, I consented to lend him the money required, but upon condition that he sent me at least once a quarter a balance sheet shewing the trade done and the state of his affairs, and that I should have full power over him, and that if I required it at any time he should assign to me the mill and all his other effects as security for my money, to which he the said *J. Ash* agreed. I thereupon advanced him the several sums next hereinafter mentioned."

The deponent then set out various sums, amounting in the whole to £600, the last instalment of which was advanced on the 2nd of June, 1871; and stated that on the 23rd of August, 1871, he examined *J. Ash's* accounts, when there appeared a deficiency of £81 0s. 1*d.*, which on the 11th of October, 1871, was reduced to £63 4s. 2*d.* He then proceeded as follows:—

"On the 26th of October, 1871, the said *J. Ash* came quite unexpectedly to my house at *Deptford*, and I saw him in the presence of my wife. He stated that he had come up to ask me to let him have some more money, and named £300, as he had not sufficient to work his business. My wife then reminded him that when he first applied for money with which to recommence business I told him that I could not advance him more than £500, and that I had already lent him £600. The said *J. Ash* then replied that he had overbought himself; that the stuff was in the mill, and must be paid for on the following Saturday; that no one could be doing better than he had been doing for the last month or two; and that he was doing more trade than he had capital for. I then said that I could not advance him more, as I felt that I had already done more than I ought on account of my large family, The said *J. Ash* then said that he had plenty of money due to him in the following week, and asked me to lend him some to meet his payments on the following Saturday, and he would repay it the following week as soon as he had collected the money that would be then payable to him. The said *J. Ash* also offered, as an inducement to me to lend him more money, then to assign *Sansbrook Mill* and all his effects to me to secure the previous advances and the amount to be then lent, to which I replied that if I did lend

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him more money I should not only require the deed offered by him, but should send down my brother to look after my interest; but I still refused to lend him more money, and suggested that his creditors would wait a few days, and that he could give them cheques post-dated to agree with the time at which he would have money to meet them; and the said *J. Ash* then left, intimating that he would act on my suggestion. On the next morning, being Friday, the 27th of October, 1871, to my great surprise, the said *J. Ash* again came to my house, bringing a note from his wife stating that he had overbought himself, and asking me to let him have an over-draft on his bankers (meaning, I suppose, that I was to be security for the money he was to overdraw). I still refused to lend him any more money, and the said *J. Ash* again offered the assignment before mentioned. I still objected, and my wife inquired particularly if the last balance sheet sent was correct, as it shewed a profit of more than £15 in one month. The said *J. Ash* repeated twice over that it was correct, and said that the loss at first starting had arisen through his buying badly, but that no one could be doing better than he was at the present time, and that if I would then assist him to get out of his temporary difficulty it should not occur again. My wife, being anxious on behalf of her sister, the wife of the said *J. Ash*, then asked, if I would lend him £100 for a week, if he would first go with me to my solicitor, Mr. *Mead*, and execute the proposed deed, to which the said *J. Ash* agreed. I, however, was not able to leave my business at that moment, and having regard to the short time for which the further advance was to be made, I proposed to let the deed stand over for the few days for which the money was to be lent, and that if it was not repaid on Tuesday, the 7th of November, 1871, the time mentioned by the said *J. Ash* at which he should have plenty of money, I should take my brother down to look after my interest, and that the said *J. Ash* should, as arranged between us, execute the assignment of the mill and all his other effects to secure all my advances, including the £100 then to be advanced. To this the said *J. Ash* agreed, and I then handed him £100 in cash.

"The said *J. Ash* did not repay to me on the said 7th of November, 1871, as agreed, the said sum of £100 so advanced by me, but on the morning of the 7th of November, 1871, I received a letter from him, stating that he could not repay me the £100 as promised, and requesting me to go down, as before agreed. I therefore, on the same day, consulted my said solicitor, and instructed him to prepare the assignment so agreed to be executed. On the 8th of November, 1871, I, accompanied by my brother *Thomas Wells*, went down to *Newport*, when I informed the said *J. Ash* that I had given instructions for, and should require him to execute the assignment according to the agreement hereinbefore set forth, and I then left my said brother in possession of the furniture so purchased by me as aforesaid, and instructed him to watch all the chattels and effects of the said *J. Ash* so agreed to be assigned to me as aforesaid, and to protect my interest therein as aforesaid."

The assignment was dated the 27th of October, 1871, and thereby, in consideration of £604 14*s.* 6*d.* previously advanced, and £20 interest thereon, and also in consideration of £100 then lent by *J. Wells* to *J. Ash*, the said *J. Ash* assigned the mill and premises, and all the stock in trade, plant, fixtures, and trade debts and contracts, to *J. Wells*, his executors, administrators, and assigns, subject to redemption on payment of the sum of £724 14*s.* 6*d.* with interest, within twenty-four hours after demand. And the deed contained power for *Wells* to take immediate possession without further notice, and to manage the business, and to sell the mill and other premises assigned.

J. Ash stated, in his examination, that from the very beginning of the transaction he was anxious to execute a bill of sale at once to *Wells*, but that *Wells* said that if he gave a bill of sale it would cripple him. In other respects he substantiated the account given by *Wells*.

On the 5th of December a petition was presented for an adjudication of bankruptcy against *Ash*, in the *Staffordshire* County Court, under which he was adjudicated bankrupt on the 15th of December. The property comprised in the assignment was afterwards sold for £718. The Judge having declared that the deed of assignment was void against the creditors, and that the household furniture was in the order and disposition of the bankrupt, *Wells* appealed from his decree to the Chief Judge in Bankruptcy, who overruled the opinion of the Judge of the County Court, and dis-

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charged the order on both points. From this decision the trustee under the bankruptcy appealed.

The question as to the furniture turned entirely on the effect of the evidence, and it is not thought necessary to report the arguments on that subject.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the Appellant:—

The assignment was clearly an act of bankruptcy. It is admitted that, practically, it comprised the whole of the debtor's property. There was no agreement for a bill of sale when the first £600 was advanced. On the contrary, the creditor declined to take one, lest the debtor should be "crippled." The bill of sale is not made valid by the fresh advance, for, in the first place, it was not given when the fresh advance was made, nor was there any absolute agreement for a bill of sale, but only a conditional promise that if the money was not paid in a week or ten days—in other words, if the debtor proved to be hopelessly insolvent—a bill of sale was to be given. In the second place, the new advance bore a very small proportion to the sum previously advanced and to the value of the property. In order to support a bill of sale, the first advance must be of such a substantial sum as would be likely to help the debtor to recover himself: *Graham* v. *Chapman* (1); *Lomax* v. *Buxton* (2); *Ex parte Cohen* (3); *Lacon* v. *Liffen* (4); *Hutton* v. *Cruttwell* (5).

Mr. *Roxburgh*, Q.C., and Mr. *Mead*, for the Respondent:—

The transaction was perfectly *bonâ fide*, and the money was all expended by the debtor in carrying on his trade. It is well established by the authorities that where a bill of sale of all a debtor's property is given, partly for a past debt and partly to secure a fresh advance, it is not an act of bankruptcy, provided the fresh advance be *bonâ fide* to enable the debtor to carry on his business. That was the case here. The whole transaction was *bonâ fide*, and the creditor refused to make the fresh advance without a bill of sale covering the whole debt. It is true that the fresh advance was small compared with the original debt, but where there is a mortgage and not a sale, that does not signify: *Mercer* v. *Peterson* (1); *Allen* v. *Bonnett* (2); *Ex parte Homan* (3).

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(1) 12 C. B. 85.

(2) Law Rep. 6 C. P. 107.

(3) Law Rep. 7 Ch. 20.

(4) 4 Giff. 75.

(5) 1 E. & B. 15.

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It is true that the execution of the bill of sale was postponed for a few days, but the promise was absolute that, in default of payment at the expiration of that time, it should be executed. It was such a contract as the creditor could have enforced if the debtor had refused to execute the assignment.

Mr. *De Gex*, in reply.

June 21. SIR G. MELLISH, L.J., delivered the judgment of the Court as follows:—

This was an appeal from an order of the Chief Judge in Bankruptcy. The County Court Judge of *Staffordshire* made an order that a deed of assignment of the 27th of October, 1871, made between the bankrupt *John Ash*, of the one part, and one *James Wells*, of the other part, was invalid as against the trustee and an act of bankruptcy, and that certain household furniture was in the order and disposition of the bankrupt at the time of his bankruptcy. The Chief Judge reversed the order of the County Court Judge on both points. We intimated at the close of the argument that, in our opinion, there was no sufficient evidence that the household furniture was in the order and disposition of the bankrupt at the time of the bankruptcy, and that on this part of the case the order of the Chief Judge must be affirmed; but we have now to determine whether the execution of the bill of sale was an act of bankruptcy on the part of the bankrupt. The circumstances under which the bill of sale was given are stated in the affidavit of *James Wells*, and we are willing to take his account of the transaction as substantially correct. [His Lordship then read the paragraphs from *Wells*' affidavit, stated above, and continued:—]

The account of the bankrupt substantially agrees with that of Mr. *Wells*, but he states that the time given to him to repay the £100 was ten days instead of a week; that the £100 was applied in paying the debts of three creditors; that he asked *Wells* from the very first day he commenced advancing him money to take an

(1) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.

(2) Law Rep. 5 Ch. 577.

(3) Ibid. 12 Eq. 598.

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assignment, but that he declined to take one because the giving a bill of sale would cripple the bankrupt. The bill of sale was as follows:—[His Lordship stated the material parts of the deed of assignment, and continued:—]

It was admitted that the bill of sale was a conveyance of the whole of the bankrupt's effects. The property comprised in the bill of sale included horses and utensils, £230; stock-in-trade at cost price, £194; book debts, £294; making altogether £718. Some deduction ought probably to be made from the amount in estimating the real value of the property conveyed, but there was no evidence what the deduction ought to be. Under the above circumstances, the Chief Judge held that the £100 was *bonâ fide* advanced on the security of the bill of sale, and that this was sufficient, on the authority of recent cases, to prevent the bill of sale being an act of bankruptcy. We agree that the authorities establish, as a general rule, that where a sum of money is advanced upon the faith of a contract that a bill of sale shall be given, the sum so advanced is to be treated as advanced upon the credit of the bill of sale, and is not to be considered as a past debt, and also that an assignment by a debtor of all his effects, partly as a security for a past debt and partly as a security for a substantial fresh advance, is not necessarily an act of bankruptcy: *Hutton* v. *Cruttwell* (1); *Pennell* v. *Reynolds* (2); *Lomax* v. *Buxton* (3); *Mercer* v. *Peterson* (4); *Allen* v. *Bonnett* (5). The present case, however, appears to us to differ from all that have been hitherto decided in some very material particulars. In the first place, the only sum which it was contended could be treated as a fresh advance made upon the credit of the bill of sale, namely, the £100, bears a much smaller proportion both to the past debt and to the value of the property conveyed than in any of the previous cases; and in the next place, according to the evidence, there was no absolute promise, at the time when the £100 was advanced, that a bill of sale should be given in all events, but only a conditional promise that if the £100 was not repaid in a week or ten days, then a bill of sale should be given to secure both the £100 and the past debt

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(1) 1 E. & B. 15. 17 Jur 392,

(2) 11 C. B. (N.S.) 709.

(3) Law Rep. 6 C. P. 107.

(4) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.

(5) Law Rep. 5 Ch. 577.

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of £624; and there is also evidence from which we infer that it was understood between the bankrupt and Mr. *Wells* from the commencement of the advances that a bill of sale was to be given, if required by Mr. *Wells*, though for the purpose of protecting Mr. *Ash's* credit in the meantime, the giving of the bill of sale was purposely postponed until he was unable to go on, and was in a state of insolvency. Was then the £100 sufficient in amount to make the advance a substantial advance? In *Pennell* v. *Reynolds* (1), which was the first case in which it was held, contrary to the opinion of Lord *Campbell* in *Bittlestone* v. *Cooke* (2) and *Hutton* v. *Cruttwell* (3), that an assignment of all a trader's effects, partly in security of a past debt and partly for a fresh advance, was not necessarily an act of bankruptcy, it does not appear what was the amount of the past debt, but the fresh advance was £250, and the goods conveyed sold for £515, and the Court did not hold that there was no act of bankruptcy, but sent the case down for a new trial on the ground that there was not necessarily an act of bankruptcy. In *Mercer* v. *Peterson* (4) the old debt was £107 8*s.* (though there was considerable doubt whether it could be considered an old debt), the fresh advance was £64, and the value of the property conveyed was £115; and Chief Justice *Cockburn* says, "The simple question then is, whether the sum of £64 can be considered as an equivalent for the transfer of the bankrupt's property. The effects we may take to have been worth £115, and even if the £64 were the sole consideration, I think we should be justified in holding it to have been a substantial consideration, sufficient to support the subsequent transaction." In *Lomax* v. *Buxton* (5) the past debt was £161, the fresh advance was £250. It does not appear what was the value of the property conveyed; but as a creditor who had a debt of £750 secured on the same property accepted the £250 in discharge of his debt, the property conveyed could not have been of much greater value. In *Allen* v. *Bonnett* (6) the past debt was £450, and the present advance was £300. It does not appear what was the value of the property conveyed; but more than seventeen months elapsed before bank-

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(1) 11 C. B. (N.S.) 709.

(2) 6 E. & B. 296. 2 Jur. N.S. 758

(3) 1 E. & B. 15. 17 Jur 392

(4) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.

(5) Ibid. 6 C. P. 107.

(6) Law Rep. 5 Ch. 577.

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ruptcy took place, and the true ground of the decision appears to have been that it was too late to rely on the execution of the deed as an act of bankruptcy, though Lord *Hatherley* recognises the rule that a substantial fresh advance will prevent an assignment of all the estate and effects of a trader being an act of bankruptcy. In the present case the fresh advance is less than a sixth of the old debt, and not more than from a fifth to a sixth of the property conveyed. We do not, however, think that we can lay down as a matter of law that the smallness of the amount of the advance necessarily makes the bill of sale an act of bankruptcy; but we think it affords strong evidence that the principal object of the parties in the whole transaction was, not to enable the bankrupt to continue his trade, but to secure to Mr. *Wells* the repayment of his past advances.

Then the other circumstances of the case which we have before pointed out are to be taken into consideration. It appears to us that Mr. *Wells* made the advance of the £100 to the bankrupt, taking from him a promise that he would repay it in a week or ten days as a test whether he could go on or not. When Mr. *Wells* was told by the bankrupt at the beginning of the interview between them that he required a further advance of £300, he must have known that in all probability a temporary advance of £100 would be insufficient for the purpose, and we cannot help thinking that he limited his advance to £100, not because he thought that sum would be sufficient to enable the bankrupt to go on, but because he calculated it was the sum which the property to be assigned to him could secure in addition to the money already advanced.

Then we think we ought to take into consideration that the promise to give a bill of sale made at the time when the £100 was advanced was but a repetition of promises previously made that a bill of sale should be given in time to save Mr. *Wells* from loss. Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result

9 QB 23.
13 CLD 248
251.
23 CLD 641

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Ex parte FISHER.
In re ASH.

13 ChD 24

from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors. In the present case we have no doubt that if Mr. *Wells* had refused to advance the further sum of £100, and a bill of sale of all the bankrupt's effects had then been given, the execution of the bill of sale would have been an act of bankruptcy, notwithstanding the previous promise of the bankrupt that he would give a bill of sale. Then ought it to make any difference that such a small further sum of £100 was advanced upon a promise that it should be repaid in a week or ten days, and that if it was not repaid a bill of sale should be given? We are of opinion that it ought not. The £100 was applied in payment of debts previously due from the bankrupt; but as the debt to Mr. *Wells* was increased by £100, the other creditors obtained no advantage from the payment. It was argued, no doubt, that the advance of £100 was to enable the bankrupt to go on with his trade, and that if he had been able to go on with his trade, that might have been for the advantage of the other creditors; but we are of opinion there was no reasonable probability, and that both Mr. *Wells* and the bankrupt must have known there was no reasonable probability, that the advance of £100, to be repaid in a week or ten days, would enable the bankrupt to go on. We are of opinion that if we were to hold this bill of sale to be valid, we should practically abrogate the rule that the assignment of the whole of a debtor's effects in consideration of a past debt is an act of bankruptcy, and should in every case enable a favoured creditor, who can trust his debtor to give him a bill of sale of all his property when required, to obtain payment of his debt in full to the prejudice of the other creditors. The result is, that so much of the order of the Chief Judge as relates to the bill of sale must be reversed, and that so much of the order of the County Court Judge as declared that the deed was invalid as against the trustee and an act of bankruptcy must be affirmed. We think that the trustee should have his costs out of the estate, but that there should be no other order as to costs.

Solicitors for the Appellant: Messrs. *Cope, Rose, & Pearson*, for Messrs. *Fisher & Hodges, Newport, Shropshire.*

Solicitors for the Respondent: Messrs. *Mead & Son.*

L. JJ.
1872
June 21.

In re GENERAL ROLLING STOCK COMPANY.

JOINT STOCK DISCOUNT COMPANY'S CLAIM.

Winding-up—Statute of Limitations—Companies Act, 1862, *s.* 98.

A company was ordered to be wound up in February, 1865. The certificate of debts and claims was made in December, 1870; and in January, 1871, a dividend was paid on the debts which had been established. In March, 1871, the holder of bills of exchange to a large amount, which had been accepted by the company and had become payable in February, 1865, gave the first notice of his claim and applied for leave to prove, not disturbing previous dividends. The proof having been rejected by the Master of the Rolls, on the ground that the debt was barred by the *Statute of Limitations*:—

Held, on appeal, that by the *Companies Act*, 1862, the assets are made applicable to the payment of all liabilities of the company subsisting at the date of the winding-up order; that from that time the *Statute of Limitations* does not run against a creditor, and that the claimants were entitled to prove, not disturbing former dividends.

THIS was a motion by way of appeal from a decision of the Master of the Rolls.

An order was made on the 11th of February, 1865, for winding up the *General Rolling Stock Company, Limited*. The general certificate as to debts and claims was made on the 14th of December, 1870. In pursuance of an order dated the 29th of December, 1870, the liquidator, in January, 1871, paid to the creditors whose debts and claims had been admitted by the certificate a dividend of 7*s.* in the pound.

On the 17th of March, 1866, an order was made for winding up the *Joint Stock Discount Company, Limited*. This company was the holder of acceptances of the *Rolling Stock Company* for sums amounting to £25,500, which fell due some in February, 1865, and the rest at the beginning of March, 1865. Owing to some unexplained omission, no claim was made in the winding-up of the *Rolling Stock Company* in respect of these bills till the 31st of March, 1871, when the liquidators of the *Joint Stock Discount Company* sent in a claim for £18,969 11*s.* 1*d.*, the balance of principal money and interest due on the bills up to the 11th of February, 1865. The claim being resisted, the liquidators of the *Joint Stock*

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Discount Company obtained an order for leave to go in and prove their debt, not disturbing any previous dividends. Upon their going in to prove, the liquidator of the *Rolling Stock Company* set up the *Statute of Limitations.* The matter was adjourned into Court, and the Master of the Rolls decided that the statute was a bar (1), and dismissed the application with costs. The liquidators of the *Discount Company* appealed.

Mr. *Fry*, Q.C., and Mr. *Jackson*, for the appeal motion:—

We submit that clearly, on the construction of the *Companies Act*, 1862, the statute is no defence. An order for winding up is analogous to a decree in a creditor's suit. The Court restrains a

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(1) 1872. May 4. LORD ROMILLY, M.R.:— WN(1872) 102.

I think this case is settled by *Ex parte Forest* (2 Giff. 42), for I do not see any such difference between the statute of 1862 and the statute of 1848 as can affect the case. The question is not one depending on a rule made by the Court; it is not like the question whether a creditor holding security could prove for his whole debt; there the Court of Chancery in administering assets, and the Court of Bankruptcy, each made a peculiar rule for itself, the question not being settled as to either Court by any Act of Parliament. Here the question must depend on the Act of Parliament. Neither the Court of Bankruptcy nor the Court of Chancery has any power to make a rule that the *Statute of Limitations* shall not apply if by law it does apply. The only question is whether there is such a vesting of the assets of the company in trust for the creditors as prevents the application of the *Statute of Limitations.* I am at a loss to find any such trust. The property is in the company, it is the property of the company, the Court of Chancery has the custody of the property of the company, and the Court of Chancery confides this custody of the property to the official liquidator; and it directs the official liquidator to proceed in the name of the company; suing in the name of the company, defending in the name of the company, accepting things in the name of the company, and the like; and there is nowhere a vesting of all the assets for the benefit of all the creditors; there is nothing in the shape of a trust. I am of opinion that although the Court of Chancery must administer the assets according to certain rules, and for the benefit of the creditors in the first instance and the shareholders afterwards, the Court of Chancery has no property vested in itself, it does not hold it as a trustee for anybody, it does not do anything to prevent the application of the *Statute of Limitations.* And I think the reason of the statute applies in this case just as much as it does in ordinary cases between the creditor and the customer; its object being to prevent stale demands, and to make persons diligent in the establishment of their claims. At all events, I think I am bound by decision, as I see no such difference between the Act of 1862 and that of 1848 as can affect the applicability of the case to which I have referred.

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creditor from continuing any proceeding to enforce his debt (sect. 85), and the Act itself precludes his instituting any proceeding without the leave of the Court (sect. 87). It cannot have been intended that in the case of a clear demand an action should be brought merely in order to avoid the *Statute of Limitations.* The property of the company is in the custody of the Court (sects. 92, 94, 95), and by sect. 98 the Court is to see the assets applied in discharge of the liabilities of the company, which must mean its liabilities existing when it is ordered to be wound up. Sect. 107 shews the extent of the consequences of not coming forward to prove in due time. Where a decree is made in a creditor's suit the statute does not run after filing the bill: *Sterndale* v. *Hankinson* (1). The case of *Ex parte Forest* (2) was under statutes the proceedings under which were in the nature of the proceedings in a partnership suit, where the assets are administered for the benefit of the partners, and not of the creditors.

Mr. *Southgate,* Q.C., and Mr. *Bush,* for the liquidator of the *Rolling Stock Company*:—

Ex parte Forest is a case which, we submit, clearly governs the present. In one of the repealed statutes, 20 & 21 Vict. c. 78, s. 7, the Legislature thought it necessary to provide that the *Statute of Limitations* should not run during the proceedings. The present statute contains no such provision.

Sir W. M. James, L.J.:—

I think that this case is entirely unprejudiced by the decision in *Forest's Case* before Vice-Chancellor *Stuart,* and that it is unnecessary for us to consider whether that decision was founded on a right view of the combined operation of the Acts of Parliament then in force. The statute which governs the present case is clear. The 98th section enacts that, "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities." A duty and a trust are

(1) 1 Sim. 393. (2) 2 Giff. 42.

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thus imposed upon the Court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section. After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, and it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the *Statute of Limitations.* It must have been intended that such leave should be given only in cases where the Court thought that an action was the most proper means of determining the question as to the liability of the company. In the present case it is not disputed that at the time of the winding-up order the company was liable to the holders of these bills, and the winding-up order enures to the benefit of the holders. No possible mischief or inconvenience can arise from this, for a day is fixed for creditors to come in and prove, and the Act expressly provides that any creditor who does not come in within the time named shall lose the benefit of any dividend that has been paid in the meantime. No mischief, therefore, can be done to the other creditors by reason of the delay or laches of any creditor, since if he delays beyond the proper time he must take his chance of what assets he can find for payment of his debt, not disturbing any former dividend.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think that the case is governed by the 98th section of the present Act, and that it is unnecessary to consider what was the proper construction of the former Acts. It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order. That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is

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that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the *Statute of Limitations* does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend.

Solicitors for the Plaintiff: Messrs. *Davidson, Carr, & Co.*
Solicitors for the Defendants: Messrs. *Mackenzie, Trinder, & Co.*

In re INDIA AND LONDON LIFE ASSURANCE COMPANY.

L. JJ.
1872
June 3.

42 L.J. 329.

Novation of Contract—Transfer of Business of Life Insurance Company—Acquiescence—Annuitant.

The deed of settlement of the *I. Life Insurance Company* provided that in a certain event a general meeting of the company might resolve on its dissolution, and that in such a case proper measures should be taken for effecting such dissolution, without prejudice to the rights of the parties then insured, and thereupon the affairs of the company should with all convenient speed be wound up, and the liabilities of the company be satisfied or otherwise sufficiently provided for by reinvestment or by transfer to other existing and approved assurance offices. In accordance with this provision a resolution was passed to dissolve the company, and the business and assets were transferred to the *E. Company.*

The Petitioner, who had purchased an annuity on his life from the *I. Company*, refused to assent to the transfer of his policy to the *E. Company*; but he received payment of his annuity from the *E. Company* till it was wound up. He then presented a petition to wind up the *I. Company*:—

Held, first, that although the dissolution and transfer of the business of the *I. Company* were perfectly valid, yet the words in the deed of settlement reserving the rights of the parties assured were conclusive in shewing that there could be no novation of the contract with the policy-holders without their consent. Secondly, that the acceptance of the payment of the annuity from the *E. Company* was no evidence that the Petitioner had adopted the *E. Company* as his debtors, and that he was still a creditor of the *I. Company.*

Order of *Malins*, V.C., winding up the *I. Company*, affirmed.

THIS was an appeal from an order of Vice-Chancellor *Malins* for the winding-up of the *India and London Life Assurance Company*, which had been amalgamated with the *European Assurance Society.*

The company was established in October, 1846, under the statute 7 & 8 Vict. c. 110.

The deed of settlement was dated the 16th of April, 1846. By the 163rd clause it was provided that if one-tenth of the nominal capital should have been lost, a general meeting should at once be convened to determine upon the propriety of dissolving the company, and at such meeting a majority of votes present might resolve on the dissolution of the company.

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The 164th clause provided "that after a resolution that a dissolution shall take place, the company shall cease to grant any new assurances, and proper measures for the purpose of effecting such dissolution, without prejudice to the rights of the parties then assured, shall be taken by a committee composed of the directors for the time being of the company and of an equal number of persons to be chosen by the proprietors, and thereupon the affairs and concerns of the company shall, with all convenient speed, be wound up, and the debts and liabilities of and claims on the company be satisfied, repurchased, discharged, or otherwise sufficiently provided for by investment or by transfer to other existing and approved assurance offices, or in such other manner and by such other means as may then be agreed on."

The Petitioner, Colonel *Dyke*, in October, 1854, purchased an annuity of £275, for which he paid £4500. The policy contained the usual clause that no director or other proprietor of the company should be liable beyond the amounts due upon their respective shares. This annuity was regularly paid till the year 1860, when the company, having lost one-tenth of their capital, passed a resolution to dissolve, and transferred their business to the *European Assurance Society* in conformity with the 164th clause.

A proposal was made to Colonel *Dyke* to allow his contract to be transferred to the *European Society*, and to accept the liability of that society for payment of the annuity in lieu of the *India and London Company*, and some correspondence took place, but in his letters Colonel *Dyke* refused to accede to such transfer, and threatened legal proceedings against the company for the purpose of restraining them from effecting the amalgamation. These proceedings were, however, not taken; and the Petitioner regularly received his annuity from the *European Society* from the year 1860 till April, 1871, when that society was ordered to be wound up. With the exception of receiving his annuity, the Petitioner did no act which could be considered an act of acquiescence in the transfer.

Colonel *Dyke* then presented this Petition for a winding-up order against the *India and London Company*. The Vice-Chancellor was of opinion that the word "approved" in the 164th clause of the deed of settlement meant approved by the person

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whose rights were transferred, and that as the Petitioner had never approved of the *European Society*, or consented to the transfer of his contract to that society, he still remained a creditor of the *India and London Company*. He accordingly made the order prayed for.(a) The *India and London Company* appealed from this decision.

Mr. *Jackson* and Mr. *Macnaghten*, for the Appellants, contended that an "approved" assurance office meant an office to which there was no reasonable objection. The object of the clause was that all proper precautions should be taken, and then that the policy-holders should be bound by the transfer of business. Colonel *Dyke* made his contract with notice of the deed of settlement, and was bound by its provisions. But, independently of the deed of settlement, Colonel *Dyke* had acquiesced in the amalgamation. He threatened at first to take proceedings to stop it, but afterwards withdrew his opposition, and then took the benefit of it by receiving his annuity regularly from the *European Society*. He had therefore accepted their liability, and released the *India and London Company*. They referred to *In re Waterloo Life Assurance Company* (1); *In re Family Endowment Society* (2); *Spencer's Case* (3); *In re Times Life Assurance and Guarantee Company* (4).

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, for the Petitioner, were not called on.

Mr. *Pearson*, Q.C., and Mr. *Murray*, for the *European Assurance Society*.

SIR W. M. JAMES, L.J.:—

I have been really surprised by the argument which has been raised by the Appellants upon the letters written by the Petitioner. They appear to me to be conclusive against any acquiescence on his part. He says in effect, "I will not be handed over to the *European*; rather than that I will file a bill against you." The directors reply that they have done nothing contrary to their deed of settlement, and they defy him to file a bill. I feel no doubt

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(1) 33 Beav. 542.
(2) Law Rep. 5 Ch. 118.
(3) Law Rep. 6 Ch. 362.
(4) Ibid. 5 Ch. 381.

(a) See WN (1872) 88.

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that the Petitioner had no right to file a bill against them, because they had not contravened the deed of settlement, and so long as his annuity was paid him he had no cause of complaint. He continued to receive his annuity from the *European*, which he had a perfect right to do, and which any other man of common sense would have done.

That brings us to the consideration of the meaning of the 164th clause of the settlement. It is not necessary to express any opinion on the meaning of that clause if it had not contained the words "without prejudice to the rights of the parties then assured;" although I am inclined to think that the clause was never intended to provide for a novation of contract with the policy-holders, but was confined to matters affecting the shareholders. Therefore, even without those words, I should have had a difficulty in seeing how the rights of the Petitioner were affected; but with these qualifying words I should not have thought, but for my experience in such cases, that the point was arguable. I am of opinion that the Vice-Chancellor's decision was right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. When a proper construction is put upon the 164th clause there is very little difficulty in the case. The dissolution is expressly stated to be "without prejudice to the rights of the parties then assured." What, then, are the rights of these assured creditors? By the terms of the policy the shareholders were not to be liable beyond the amount due on their shares. But Colonel *Dyke* had a right to insist that if it was necessary they should be called upon to pay the full amount of their shares, and this was one of the rights which were not to be prejudiced.

The only question therefore is, whether the Petitioner has done anything to abandon this right. The effect of the correspondence seems to me perfectly clear. Both parties appear at first to have put their claims too high. The company said, "We can hand you over to the *European Assurance Society* without your consent;" and Colonel *Dyke* said, "You have no right to make the transfer at all." Ultimately both parties assented to what appears to me

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the true construction of the clause, namely, that the company had a right to transfer their business to the *European*, but that Colonel *Dyke*, if he could not get his annuity from the *European*, still retained his right to recur to the *India Company*. He refused to accept any fresh policy, but simply went to the *European* and received his annuity from them, treating them as the hand to make the payment; but he did this without prejudice to his right to come upon the *India Company* if the *European* did not pay him.

Solicitors for the Appellants: Messrs. *Uptons, Johnson & Co.*

Solicitors for the Petitioner: Messrs. *Dangerfield & Fraser.*

Solicitors for the *European Society*: Messrs. *Lewis, Munns, & Longden.*

PRESTON *v.* CORPORATION OF GREAT YARMOUTH.

L. JJ.
1872
June 19.

[1870 P. 54.]

Corporation Bonds—Right to Payment—Payment by Lot—Receiver.

By an Act of Parliament, Commissioners were appointed, who were to expend money in improving a town; they were authorized to levy rates on the town and to borrow money on the security of the rates, giving bonds for the money so borrowed, of which £100 at the least should be chosen by lot, and paid off every year. Interest on the bonds had been duly paid, and, except in two years, £100 had been paid off every year, but above £15,000 remained on the security of the bonds:—

Held (affirming the decision of *Bacon*, V.C.), that holders of bonds to the amount of £800 were not entitled to immediate payment out of the rates or to a receiver of the rates.

BY an Act of Parliament, 50 Geo. 3, c. xxiii., the mayor of *Great Yarmouth* and other persons were appointed Commissioners, and were authorized to provide for lighting and paving the town, and to execute other works in the town. And for the purpose of raising money to answer and defray the charges of carrying the Act into execution, the Commissioners were authorized to assess and levy certain rates on the landlords and owners of lands and buildings in the town of *Great Yarmouth*. And it was enacted "That it shall and may be lawful to and for the said Commissioners, or any seven or more of them, from time to time to borrow and take up at interest such sum or sums of money, so as that the sum borrowed shall not at any one time exceed in the whole the sum of £20,000, as they shall judge necessary for the several purposes of this Act upon the credit of the said rates, assessments, and moneys to be made, levied, collected, and received by virtue of this Act, and by writing under their hands and seals to assign all or any part of the said rates, assessments, or moneys to such person or persons as shall lend or advance any money thereon, or to his heir, or their trustee or trustees, as a security for the principal money to be advanced with legal interest for the same, and the charges and expenses of such assignment thereof (to be made as hereinafter mentioned), shall be from time to time defrayed by the said Commissioners out of the moneys so borrowed." And it was enacted that the Commissioners should every year after the expiration of the first three years from the day of the commencement of the Act pay off and discharge the sum of £100 at least of the moneys borrowed on the credit of this Act, together with the interest due thereon; and provision was made for choosing by lot in every year the security or securities to be so paid off.

The Commissioners borrowed considerable sums of money under the Act, for which sums they gave bonds of £100 each in the following form:—

> "We, seven of the Commissioners, &c., in consideration of the sum of £100 advanced and lent by *A. B.*, of &c., upon the credit and for the purposes of the said Act, do hereby grant and assign unto the said *A. B.*, his executors, administrators, and assigns, such proportion of the rates, assessments, and moneys to be raised, levied, collected, and received by virtue of the said Act as the said sum of £100 doth or shall bear to the whole sum which may at any time be borrowed or become due and owing or be charged upon the credit of the said rates, assessments, or moneys to be had and holden from the 29th day of September last, until the said sum of £100, with interest at 4 per centum per annum [for the same, shall be repaid and satisfied."

By the *Public Health Supplemental Act* for *Great Yarmouth*, 1851 (confirming a provisional order of the General Board of

Health, under the *Public Health Act,* 1848), the mayor, aldermen, and burgesses of *Great Yarmouth* were made the Local Board of Health for the district, and the powers and liabilities of the Commissioners under the former Act were, in fact, vested in the mayor, aldermen, and burgesses.

The interest had been regularly paid upon the bonds. As to the repayment of the principal, it did not appear what had been done before 1851; but since 1851, except in two years (as to one of which it was said that there had been an oversight), one £100 bond had been every year chosen by lot and paid off; and £15,150 remained outstanding on the bonds given under the Act. The rateable property was ample for the payment of the interest on the £15,150.

Amongst the sums borrowed were £500 from one *S. Brown,* and £300 from *G. Bateman,* both borrowed in 1837. The bonds for these sums had been assigned to *Anne Preston,* who died in 1869; and *Isaac Preston* and *C. A. Preston,* solicitors, of *Yarmouth,* her executors, filed the bill in this suit on behalf of themselves and all other the mortgagees, except those who did not wish to be paid off, against the mayor, aldermen, and burgesses, and one *Mary Leeds* as representing the mortgagees who did not wish to be paid off, praying a declaration that the Plaintiffs were entitled to have the rates levied under the Acts applied in payment of the principal money and interest due to the Plaintiffs on the bonds, and praying the consequent accounts, and praying for a receiver of the rates.

It was stated that the bonds were saleable at a little below par.

The cause came on to be heard before the Vice-Chancellor *Bacon,* who dismissed the bill with costs (1).

The Plaintiffs appealed.

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(1) 1872. Feb. 13. Sir J. BACON, V.C., said that the Plaintiffs' claims could not be sustained. The suit was a complete novelty, unless *Drewry* v. *Barnes* (3 Russ. 94) was a precedent. The cases of railways, market-tolls, and so forth, were quite different, for there the borrowers had a profit to receive. Here the corporation took nothing for themselves; they could only levy a rate, and the mode in which the money so raised was to be applied was pointed out by the Act. The Commissioners must provide for paving and lighting and the other requirements of the town, and in paying the interest on the mortgages and the principal according to the Act; but there was nothing more for them to raise or for a receiver to receive. It

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Mr. *Eddis*, Q.C., and Mr. *W. Pearson*, for the Appellants:—

The corporation admit that they do not intend to pay the Plaintiffs, and say that they must take their chance of having their bonds drawn by lot, and may, therefore, not be paid for 150 years. If the corporation had punctually paid off £100 a year, the bondholders might have nothing to complain of. But the corporation have not done so, and therefore cannot insist that the Plaintiffs are bound to wait. This is precisely like *Hopkins* v. *Worcester and Birmingham Canal Proprietors* (1), inasmuch as no time for payment of the principal has been fixed. The rates have been assigned to us, and we have a charge on them, and as default has been made we are entitled to a receiver, and to be paid: *Eastern Union Railway Company* v. *Hart* (2). The fact of the corporation being a public body makes no difference in the rights of the Plaintiffs, and moreover the receiver would not injure the ratepayers, as, of course, he would pay the balance to the use of the town. Are the Plaintiffs to have no remedy? The corporation does not provide any sinking fund, and it is a mockery to tell us that we shall be paid in 150 years.

Mr. *Kay*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Rodwell*, for the Defendants, were not called upon.

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might, in fact, be doubted whether a receiver could levy rates, and whether a justice of the peace could grant him an order to distrain. In the case of *Hopkins* v. *Worcester and Birmingham Canal Proprietors* (Law Rep. 6 Eq. 437) the Defendants were in receipt of the profits of a canal, and that made a clear distinction. In *Drewry* v. *Barnes* (3 Russ. 94) Lord *Lyndhurst* said, that if the Commissioners refused to make a rate to pay interest on borrowed money, the Court of Queen's Bench would compel them to make a rate, and would decide how much it ought to be; but this Court had never done such a thing. In *Fletcher* v. *Gibbon* (23 Beav. 212) the Commissioners had deprived the Plaintiff of the benefit of the ballot, and the Court thereupon directed an account to be taken, but even then did not appoint a receiver. The Plaintiffs were under no hardship, as they could easily dispose of their bonds if they wanted the money. It was monstrous to suppose that the whole £15,150 was to be levied in one year, and contrary to the terms on which the money was lent. The proceeding of the Plaintiffs was altogether misconceived, and the bill must be dismissed with costs.

(1) Law Rep. 6 Eq. 437.

(2) 8 Ex. 116.

SIR W. M. JAMES, L.J. :—

This is a contention raising, or supposed to raise, several nice points, although the result could only affect the Plaintiffs to the extent of a few pounds at the utmost, and these few pounds would belong to the Plaintiffs in a representative character.

In my opinion, the litigation is as idle in point of legal contention as in substance. I cannot bring myself to doubt what is the meaning of this Act of Parliament, or what is the proper construction to be put upon it with regard to these mortgages.

The Commissioners of *Great Yarmouth* were authorized to raise money on the rates of the borough for certain public purposes, taking the money, not as a loan to themselves, or as money advanced on their own property, for they had no property, but as money lent on the security of rates to be raised under the Act. The Act further contained express provisions how the principal was to be repaid. It was contemplated that the repayment should extend over a long time, and the provision was that the Commissioners were, at all events, to apply £100 in each year in payment of creditors selected by ballot. There was a particular machinery provided for the ballot, and that was the sole provision made by the Act of Parliament for the repayment of the principal.

That provision is, to my mind, plainly inconsistent with the idea that any creditor whose bond was not drawn at the ballot would be entitled immediately to go and demand the principal. That however is the contention here; for the case made by the bill is, that any of the creditors have power to call on the Commissioners for repayment of the money advanced, and in default to come to this Court for a receiver.

I am of opinion there has been no default. The interest has been paid regularly, and the corporation are paying £100 a year in discharge of the principal. They are doing all that the Act of Parliament intended them to do; and, there being no default in payment of principal or interest, it appears to me that this Court has no jurisdiction or power to interfere with the application of the moneys by the persons whom the Acts of Parliament have appointed. I am of opinion that the decision of

L. JJ.
1872
PRESTON v. CORPORATION OF GREAT YARMOUTH.

the Vice-Chancellor is perfectly correct, and ought to be affirmed with costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors for the Plaintiffs: Messrs. *Sharpe, Parkers, & Co.*

Solicitors for the Defendants: Mr. *A. Storey* and Mr. *F. T. Dubois*

L. JJ.
1872
June 22.

HEASMAN *v.* PEARSE.

[1867 H. 238.]

Will—Issue—" Then Living"—Divesting of Vested Gift.

A testator directed his trustees, after the failure of limitations for life and in tail, to sell his real estate and pay a third of the proceeds unto and amongst the children of *A. H.*, deceased, except *J. G. H.*, who should be then living, and the issue of such of them as should be then dead leaving issue, and the issue of *J. G. H.*, except his son *J. W. H.*, share and share alike; the issue of deceased children of *A. H.* to have no greater share than their parents would have had if living, and the issue of *J. G. H.* to have no greater share than the issue of any other child of *A. H.* He gave another third upon trust to pay the income to *P. J.* for life, and after her decease to pay and divide such third share unto and amongst all the children of *P. J.* who should be " then living," and the issue of such as should be then dead, such issue to take no greater share than their parents would have had if living. At the end of the will was a proviso that if his estate should ever be sold under the above trust, and the money, or any part of it, become payable to the issue of *A. H.* and *P. J.*, or the issue of *J. G. H.* (except *J. W. H.*), or any of them, and any one or more of such issue should be then dead having left lawful issue, then the issue of such issue as should be so dead should have the share to which their, his, or her parent would have been entitled if living:—

Held, that a child of *P. J.*, who survived her, but afterwards died before the period of distribution leaving issue, acquired a vested interest which was not by the final proviso divested in favour of the issue of such child; the word " issue " being held not to apply to children of *P. J.*

THIS was an appeal by children and issue of *William Jupp*, a child of *Philadelphia Jupp*, from so much of an order of Vice-Chancellor *Malins* as related to the share of *Philadelphia Jupp* in the testator's estate. The facts will be found fully stated in the report before the Vice-Chancellor (1), and in the report of a previous appeal as to another share (2).

Mr. *Pearson*, Q.C., and Mr. *H. C. Ward*, for the Appellants, relied on the previous decision of the Court of Appeal.

Mr. *Glasse*, Q.C., and Mr. *Charles Hall*, *contrà*.

Mr. *Stallard*, for the Plaintiffs.

Mr. *Pearson*, in reply.

SIR W. M. JAMES, L.J. :—

I think that the decision of the Vice-Chancellor must be affirmed. The case is not, in my opinion, in any way governed by our decision on the former appeal. We did not on that occasion use the proviso at the end of the will for the purpose of altering the effect of clear words in another part of the will, but for the purpose of explaining something which required explanation, so far as the *Heasman* family were concerned. But by that part of the will which relates to the *Jupp* family, one third of the testator's estate is clearly given to Mrs. *Jupp* for her life, and at her death to her children then living and the issue of her children then dead. That is a clear gift; the words "then living" having the clear meaning of "living at her death." The word "then" cannot be referred to any other period. That being so, there is a clear vested gift to the children of *Philadelphia Jupp* living at her death, and the issue of such of her children as shall be then dead. Then is there anything which enables us to say that that clear vested gift to her children is divested and given to somebody else? The Appellants contend that this is effected by the proviso at the end of the will. [His Lordship read the final proviso (3).] It is said that "issue" includes children, that shares become payable to the children of *Philadelphia Jupp* who survive her, and if any of them die before the period of distribution leaving issue, such issue must take their shares. Mr. *Charles Hall* has called our attention to this, that there was a gift before to persons described as issue who were issue, but not children of *Philadelphia Jupp*, and who took as joint tenants *inter se*, and it is *primâ facie* to be supposed

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(1) Law Rep. 11 Eq. 522.

(2) Law Rep. 7 Ch. 275.

(3) Law Rep. 7 Ch. 277.

L. JJ. 1872 HEASMAN v. PEARSE.

that this clause was intended to apply to them, and was not intended to apply to the share of a child who takes a vested interest as tenant in common. I think that what Mr. *Charles Hall* pointed out is very much strengthened by the concluding words of this proviso, in which the testator says: "And shall receive the part or share to which their, his, or her parent would have been entitled if living." That is to say, to prevent the family being deprived of the share which would otherwise go over from a joint tenant to his co-tenants, I make a proviso to substitute the issue in that case. That has nothing to do with the case of a person who is provided for and takes an actual interest vested in him at the death of a tenant for life, and his title to which was in no sense contingent on his surviving. I am of opinion, therefore, that the decision of the Vice-Chancellor must be affirmed.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *E. C. Holmes & Son*; Mr. *A. S. Edmunds.*

L. JJ. 1872 July 4.

Ex parte SMITH.
In re ANGERSTEIN.

Bankruptcy—Order to pass Public Examination—Conditional Order—Bankruptcy Act, 1869, *s.* 19—*Bankruptcy Rules*, 1870, *r.* 140, *Form* 45.

The Court of Bankruptcy has no power to make an order that a bankrupt do pass his public examination conditional on his doing certain acts. The examination ought to be adjourned till he has done all that is required by the Act and the Rules, and till he is able to swear his affidavit in the Form No. 45 appended to the Rules, and then an absolute order for his passing should be made.

THIS was an appeal from an order of a Registrar of the *London* Bankruptcy Court sitting as Chief Judge.

The bankrupt was Mr. *J. C. F. Angerstein*, who was an officer in the Grenadier Guards. He was adjudicated a bankrupt on the 20th of July, 1871, and Mr. *S. Smith* was appointed his trustee. The first public examination of the bankrupt, under the 19th section of the *Bankruptcy Act*, 1869, was held on the 17th of November, 1871, and was adjourned from time to time till the 19th of April, 1872. In the course of his examination it appeared that in his statement of accounts he had omitted some items of his property and the names of some of his creditors.

On the 19th of April the Registrar made the following order: "That the bankrupt do give up to the trustee the barrack furniture, cigarette case, and any other articles referred to in the bankrupt's examination taken this day, and that the said bankrupt do amend his statement of accounts by inserting therein all his creditors omitted therefrom, and also by inserting therein, in the property sheet, the jewelry, furniture, and other articles disclosed in the said examination; and that subject to the said bankrupt complying with this order he do pass his public examination."

From this order the trustee appealed.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

The Court has no power to make a conditional order for the bankrupt to pass his public examination. How will it be known whether the bankrupt has complied with the conditions? For nothing will appear upon the files of the Court. The Registrar ought to have adjourned the examination until it was satisfactory, and then made an absolute order. When the bankrupt passes his public examination he has to sign and swear to a memorandum according to the Form No. 45 appended to the Bankruptcy Rules, 1870, by which he states "that his statement of accounts contains a full and true disclosure and discovery of all his estate and effects, both real and personal." Until the bankrupt can sign this, which has not yet been done in the present case, the order to pass cannot be made. It is the duty of the trustee to bring the irregularity before the Court, and not to leave it to the creditors: *Ex parte Brook* (1).

Mr. *Finlay Knight*, for the bankrupt:—

The public examination of a bankrupt under the Act of 1869 stands on a different footing from the final examination under the Act of 1861. By the 158th section of the Act of 1861 the passing of the final examination was made a condition precedent to the

(1) 8 L. T. (N.S.) 375.

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bankrupt applying for his order of discharge. There is no similar provision in the Act of 1869 as to the passing of the public examination. A bankrupt may now apply for his order of discharge at any time, and it might be granted before he had passed his public examination, if it had not been for the 140th rule of the Bankruptcy Rules, 1870, which provides that the order of discharge shall not be granted till after the public examination. With respect to Form No. 45, which the bankrupt has to sign, it would have been already signed in this case if it had not been for this appeal. No good end will be answered by adjourning the examination again, for the bankrupt can always be summoned to give any further information, and his order of discharge refused till he gives it, and the Court has no right to use the power of adjourning the examination as an instrument for putting pressure on the bankrupt: *Ex parte Grummitt* (1).

SIR W. M. JAMES, L.J.:—

I am of opinion that the Registrar ought not to have made a conditional order in this case. This is a matter of substance, not of mere form. The order that a bankrupt do pass his public examination ought to be a simple order, and ought to appear on the files of the Court as a simple order, made when all the conditions precedent prescribed by the Act and by the rules have been complied with. The Registrar ought to have adjourned the examination till this had been done. One of the essential preliminaries to passing the examination is, that the bankrupt shall swear an affidavit according to the Form No. 45 appended to the rules, and until he is able to swear that affidavit there is no power in the Registrar to make the order. This order, therefore, must be discharged so far as it directs that the bankrupt do pass his public examination.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Lumley & Lumley*.

Solicitors for the Bankrupt: Messsrs. *Linklater, Hackwood & Co.*

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(1) 33 L. J. (Bkcy.) 43. 10 Jur N.S. 798.

In re RIDGE'S TRUSTS.

L. JJ.
1872
June 22;
July 6.

20 ChD 41
414

Will—Construction—Implication—Cross Remainders—Issue.

A testator gave his residuary personal estate upon trust to pay the income equally between his three daughters, *F.*, *E.*, and *C.*, during their respective lives; and if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying, in equal shares; and if only one such daughter should die leaving issue, then in trust to pay and apply the whole residue equally amongst the issue of such one daughter; but if all the daughters should die without leaving issue, then over. *C.* died leaving issue, and afterwards *F.* died without leaving issue:—

Held (reversing the decision of *Wickens*, V.C.), that cross limitations were to be implied between the daughters and their families, and that the issue of each daughter were, for all purposes, to be ascertained at her own death; and that therefore one moiety of *F.'s* share was payable to the issue of *C.* living at *C.'s* death, and the other moiety went by way of accretion to *E.'s* original share.

THIS was an appeal from an order of Vice-Chancellor *Wickens.*

Charles John Ridge died in 1820, having by will declared the trusts of his residuary personal estate as follows:—

"And as to all the remaining interest and dividends of my estate and effects, upon trust to pay and apply the same equally between my daughters by the said *Anne Connor*, viz., *Frances Ridge*, *Eliza Ridge*, and *Caroline Ridge*, and any other daughter or daughters I may hereafter have by the said *Anne Connor*, during their respective natural lives; and if all, any, or either of them shall depart this life leaving issue, then in trust to pay and apply one equal part, share, or proportion of the principal of my said residuary estate and effects corresponding with the number of my said present and future born daughters, unto and amongst the issue of each of my said present and future born daughters that shall happen to die leaving issue, in equal shares and proportions; and if only one of such daughters shall die leaving issue, then to pay and apply the whole residue of my said estate and effects to or equally amongst the issue of such one daughter; but if all such daughters shall die without leaving issue, then I give all the said rest and residue of my said estate and effects to each

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youngest child of every one of my sisters living at the time of such failure of issue of my said daughters, to be divided between such youngest children share and share alike."

The testator left only the three daughters named in the will.

Caroline Ridge married Mr. *Graham*, and died in 1844, leaving four children, all of whom attained twenty-one. One of these children—Mrs. *Livesay*—died in 1868, leaving two children born after Mrs. *Graham's* death.

Frances Ridge died in 1870, having never married. At her death the issue of *Caroline Ridge* were five in number, namely, her three surviving children and Mrs. *Livesay's* two children.

Eliza Ridge was still living, and a spinster upwards of sixty years of age.

On the death of Mrs. *Graham* her one-third share of the estate was divided among her four children. After the death of *Frances Ridge* the trustees made some payments out of her share to the three surviving children of Mrs. *Graham*, and paid the residue into Court under the Act for the relief of trustees. Mrs. *Livesay's* two children, who were still infants, then presented a petition claiming two-fifths of Mrs. *Graham's* third share.

Vice-Chancellor *Wickens* directed the fund to be accumulated until the death of *Eliza Ridge* or further order (1). The Petitioners appealed.

(1) 1872. April 30.

SIR JOHN WICKENS, V.C.:—

I have read over this will and considered it, and see no reason to doubt that the opinion I intimated yesterday was the correct one—that is to say, that the division will be, in the event which it is supposed will happen, of *Eliza Ridge* dying without issue, among the issue of all generations, the issue generally of *Caroline Ridge*. It is quite clear from the will that the testator knew the difference between "children" and "issue," and there is nothing to enable me to put a restricted construction on the word "issue." "The issue" must mean either such issue or all the issue. If the former, it means issue living at the daughter's death, which is, of course, an unsatisfactory construction. I think, with reference to an argument addressed to me by Mr. *Casson*, that I can see no trace here of cross limitations, and consequently in the result, which I cannot forecast, there may be an intestacy, or there may be a gift to a class yet capable of accretion. Under the circumstances, all I can do is to direct the costs to be paid and the fund to be accumulated until the death of the surviving daughter or further order.

Mr. *Freeling*, for the Appellants :—

The will does not in terms provide for the event which has happened, of one daughter dying without issue and another dying leaving issue while the third daughter is living; but an immediate gift over is to be implied. The issue of each daughter, who are to take her share, must be ascertained at her own death, and the natural construction is that the same class who take one share take the others if they go over.

Mr. *Martineau*, for the surviving children of Mrs. *Graham* and the husband of Mrs. *Livesay*.

Mr. *Casson* for the trustees :—

If only one daughter leaves issue, her issue take the whole fund. If none leave issue, the fund goes over. There is no express provision to meet the case of two daughters leaving issue. In such a case intestacy cannot have been intended, so cross limitations ought to be implied: *Re Clark* (1); *Vanderplank* v. *King* (2).

Mr. *Freeling*, in reply.

July 6. SIR W. M. JAMES, L.J. :—

The question in this case depends on the construction of a will, the material parts of which are very short. They run thus :—[His Lordship here read so much of the will as is set out above.]

Now it is obvious that this is not a complete testamentary disposition. It is a mere sketch of a will, and the question is, whether we can fill in that sketch and supply the obvious gaps in it by judicial implication. The testator has not provided for the case of two daughters leaving issue, and he has not provided for this, which might happen, viz., that one of the three daughters might die immediately after his death a spinster, leaving the other two daughters spinsters who might not marry for a number of years. It is obvious therefore that the testator has not made a complete

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(1) 11 W. R. 871.

(2) 3 Hare, 1.

20 Ch. D. 414

disposition. If this had been a gift of real estate to the three daughters and the heirs of their bodies as tenants in common in tail, and a gift over in the event of all of them dying without issue, it would have been the common ordinary case in which cross remainders in tail would have been implied. If, again, the will had run thus: "I give the gift to the three, and on their death to their respective children, and if any of them should die without children, then to the survivor or survivors, and if all should die without children, then over," that would have been a case in which "survivors" would have been construed "others."

Now I am of opinion that this case falls entirely within those principles. It is a case in which we are authorized and bound to fill in the will, and to supply the gaps by judicial implication of the testator's meaning. The testator obviously intended that the objects of his bounty were to be his daughters' families if they should have any. He intended that the property should be enjoyed by them and not go over to anybody else as long as any of the daughters or their families survived; and the only mode in which that general intent of the testator can be effectuated so that the property shall be secured to the daughters and their issue, and not go over till the issue of all the daughters fail, is by supplying, not cross remainders in tail, since the subject-matter is not real estate, but cross limitations between the daughters and their families. Indeed, this will lends itself to that more readily than most wills in which implication has been introduced, for the Court is not striking out a single word; it is not contradicting anything in the will, but it is giving to every sentence its plain, grammatical, and ordinary meaning. If any of the events provided for happen, then the will takes effect according to its letter. The implication only applies to events for which the testator has not in terms provided, but as to which no person applying merely common sense to the will can have any doubt what he intended.

Then with regard to one of the points raised by the Vice-Chancellor, we are of opinion that the class of issue must be in every case ascertained at the death of the daughter leaving issue surviving. To hold that the class of issue of any daughter is in any case to remain in suspense until some other daughter dies would contravene the cardinal rule of construction which this Court has always adopted for reasons of family convenience and public policy, viz., that interests are to be vested as soon as they can be consistently with what the testator has said. In truth, if we were to read this will otherwise, and say that the issue of *A.* are to be ascertained, not at *A.'s* death, but at the death of *B.* or *C.*, or of *B.* and *C.*, that would be to contradict the last gift in the will, which is, "to pay and apply the whole residue of my said estate and effects to or equally amongst the issue of such one daughter." Under this gift, if one daughter dies leaving issue and the other two afterwards die without issue, the issue of the first daughter take the whole fund; but if they are ascertained at the death of the survivor it must be held that the interests which the class of issue ascertained at the first daughter's death take in her share are liable to be divested so as to let in other issue, a construction which the Court would not readily be induced to adopt. The result will be, that with regard to the share now left vacant by the death of one daughter, one moiety will be given to the issue who take their parents' share, *i.e.* to the four children of Mrs. *Graham*, and the other moiety will go by way of accretion to the share of which the surviving daughter is tenant for life, and at her death it will go to her issue, if any, and if none, to the children of Mrs. *Graham.*

SIR G. MELLISH, L.J., concurred.

Solicitors for all parties: Messrs. *Cunliffe & Beaumont.*

L. JJ.
1872
July 11, 12.

MEINERTZAGEN *v.* WALTERS.

[1870 M. 152.]

Will—Ademption—Advances to Children—Double Portions—Residue—Widow and Children.

16 Eq 263,
10 Ch 346, 351.
15 Ch D 542, 7

A testator directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life, and to divide the other moiety between his children in equal shares, as tenants in common.

Advances were made by the testator to some of his children after the date of his will:—

Held (affirming the decision of *Bacon*, V.C.), that the advances could only be brought into account for the benefit of the children among themselves, and that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue.

Montefiore v. *Guedalla* (1) distinguished.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

Daniel Meinertzagen, by his will, dated the 15th of January, 1859, devised and bequeathed all the residue of his real and personal estate and effects to *G. S. Walters*, *A. Castellain*, and *Johannes Tideman*, thereinafter appointed executors of his will upon trusts for conversion and investment, and upon further trust that they should, so long as his wife *Amelia* should continue his widow and unmarried, pay the annual produce of one equal half part of the said trust moneys unto her for her own absolute use and benefit, with a reduction in the event of her second marriage, and as to the other moiety of the said trust moneys and securities, and the dividends, proceeds, and annual produce thereof, from and immediately after his death, in trust for all and every his children who being sons should attain twenty-one, or being daughters should attain that age or marry, with consent as therein specified, to be divided between them in equal shares as tenants in common.

The testator died on the 12th of July, 1869, leaving his widow and seven children surviving. Of these children one, *Johanna*, was married to the Defendant *Alers Hankey* in October, 1859, and another, *Hermine*, to the Defendant *Thomas Hughes Jackson* in June, 1862. Two of the others were still infants. Settlements were executed upon the marriage of Mrs. *Hankey* and Mrs. *Jackson*, and further transfers of property were made to the trustees of their settlements by the testator.

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(1) 1 D. F. & J. 93. 6 Jur NS. 329.

Independently of these settlements, various sums were alleged to have been advanced by testator to his children, and gifts made to his wife, during his lifetime and after the date of his will.

A bill having been filed by the widow for administration of the estate, one of the questions which arose upon further consideration was, whether the moneys advanced or settled by the testator in his lifetime, after the date of his will, to or upon his children, were to be taken into account as part of their respective shares in the residuary estate of the testator, so that the widow would be entitled to one moiety of the income of the residuary estate as increased by the sums advanced to the children, or whether she was only entitled to the income of one moiety of the actual residue unaugmented by the advances.

The Vice-Chancellor was of opinion that the Plaintiff was not entitled to have her income increased by having the advances brought into hotchpot, (a) and from this decision the Plaintiff appealed.

Mr. *Eddis*, Q.C., and Mr. *Vaughan Hawkins*, for the Appellant:—

The advances made by the testator to the children in his lifetime were ademptions *pro tanto* of their shares in the residue, and they ought to be brought into hotchpot before the residue is divided. We admit that there is no case exactly in point; but we are not seeking to extend the doctrine of ademption by advancement; what we claim is a legitimate deduction from the principle. That doctrine applies equally to the share of a residue as to a legacy of fixed amount, although at first there was some doubt upon the subject. It is now well established by *Montefiore* v. *Guedalla* (1). In the case of an ordinary legacy to a child being adeemed, all the residuary legatees take the benefit of the ademption whether children or strangers: *Kirk* v. *Eddowes* (2). Why should not the same result follow from a share of the residue being adeemed? The basis of the rule is the moral obligation which is supposed to exist that a father should provide for all his chil-

(1) 1 D. F. & J. 93. 6 Jur N S 829 (2) 3 Hare, 509.

(a) See W N (1872) 70

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dren equally; and the law, so to speak, interpolates into the will the intention to satisfy this obligation; and then, if the testator makes an advance in his lifetime, it is like paying off part of a debt, which must necessarily operate to swell the residue, whether given to children or to a stranger: *Thynne* v. *Earl of Glengall* (1); *Trimmer* v. *Bayne* (2); *Hinchcliffe* v. *Hinchcliffe* (3); *Beckton* v. *Barton* (4); *Dawson* v. *Dawson* (5).

It is said on the other side that the provisions as to hotchpot contained in the *Statute of Distributions* have never been extended so as to operate between the widow and the children of an intestate; but that rests upon special enactment, nor can any inference from the law in case of an intestacy be applied to the division of the residue under a will: *Smith* v. *Strong* (6).

Mr. *Amphlett*, Q.C., Mr. *C. Hall*, Mr. *Cracknall*, and Mr. *Latham*, for the Defendants, the children of the testator, were not called on.

SIR W. M. JAMES, L.J.:—

The contention of the Appellant in this case is so shocking to my common sense and to my sense of justice that I am glad to find that there is no foundation in the authorities for holding that the law of *England* is subject to that opprobrium which, if the law were as alleged, it would be justly subject to in the eyes of the civilized world.

The contention of the Appellant is, that if a father leaves his residue between a child and a stranger, and then makes a large advance to the child and also a large advance to the stranger, there being nothing more but the will and those advances, the law of *England* is this, that the child is obliged to bring what he has received into the residue, and that the stranger is not to bring in what he has received, but is to have it enlarged by that which has been given to the child.

The origin of the rule as applied to legacies is this—that where a father makes a provision for his children, leaving them legacies, and afterwards gives a portion to one of those children, it is supposed, from what is known to be the ordinary intention of testators, that he did not intend to make any real difference between his children, and that the child advanced in his lifetime takes the advance *pro tanto* by way of ademption. No doubt that has been necessarily applied to the advantage of residuary legatees, because, where the legacy fails, or is satisfied, or is adeemed, from the very nature of the case the residuary legatee who takes his chance gets the benefit of that, as he would the burden of any diminution. That is the state of the law with regard to legacies. It is true the rule was applied to a share in a residue in the case of *Montefiore* v. *Guedalla* (1), which was a case in which I observe that the Lord Justice *Knight Bruce* expressed great doubt as to the law, but he was satisfied in concurring in the decision, because the common sense of the thing was in favour of the decision in that particular case. But what was done in *Montefiore* v. *Guedalla*, in my view of it, was not an application of any such view as is here contended for, but was an application of the general principle which was supposed to underlie the rule, and of which the rule was only an application and an illustration. The principle is that it must be presumed that a father intends equality between the children; and if he leaves the residue to the children, and afterwards makes an advance to one of the children, the general rule is that such advance must be brought into hotchpot, so that the disposition of his fortune, by which he intended to produce equality among the children, may not be altered. Whether, following out the rule logically, it might be applied to such a case as that before us, I do not think it necessary to consider; for I am satisfied of this, that if the logical carrying out of the rule there acted upon would lead to such a result as is involved in the contention of the Appellant, the sooner that case is overruled by the House of Lords the better. It seems to me monstrous that the widow, who may have received, and in the present case has received, advances as well as the children, is to be benefited by advances made to the children, and that she herself is under no obligation whatever to bring in advances which have been made to her. That would equally apply to a stranger as a widow, and I am of opinion that there is nothing in the law or in the authorities which compels me to come to a

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(1) 2 H. L. C. 131.

(2) 7 Ves. 508.

(3) 3 Ibid. 516.

(4) 27 Beav. 99. 5 Jur N S 347

(5) Law Rep. 4 Eq. 504.

(6) 4 Bro. C. C. 493.

(1) 1 D. F. & J. 93. 6 Jur NS 329

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decision which, to my mind, would be contrary to common sense and common justice. I concur, therefore, in the opinion of the Vice-Chancellor.

SIR G. MELLISH, L.J. :—

I am of the same opinion. It is admitted that there is no express authority upon the question which is now before us; and indeed it seems clear that prior to the case of *Montefiore* v. *Guedalla* (1) there was no authority that the rule as to double portions was to be applied to residue; but the rule as to double portions having to a certain extent been applied to gifts of residue in that case, we are now to determine whether that is to be carried so far as that every stranger who has an interest in the residue, whether it be an interest for life or an interest in the capital of the residue, is to have the benefit of the application of the rule.

Now, in the ordinary case of a legacy, where a legacy has been left to a child, and then a gift has been made which amounts to an ademption of that legacy, there certainly appears to be no possible way of holding it to be an ademption so as to carry out the general rule against double portions, except by holding that whoever has the residue benefits by it; because by the necessity of the case the persons who have the residue must benefit by the fact of the previous legacy not being paid from any cause whatever. But when we come to apply the rule as to a share of residue, it appears to me that it is perfectly easy to carry out what I consider the real principle of the rule, namely, equality between the children, without allowing the stranger to take any benefit. It appears to me, therefore, that if the rule is to be applied to a share of residue it is to be applied simply to such an extent as may be necessary to carry out the principle that a testator who has divided his residue among his children, either equally or in any other proportion, does not intend to alter that equality or proportion by making a subsequent gift to a particular child. I think there is great good sense in what was said by Lord *Hardwicke* in *Farnham* v. *Phillips* (2), and Lord *Rosslyn* in *Freemantle* v. *Banks* (3), that it is very difficult to conclude from a gift of residue, which in its very nature is uncertain, that a testator has fixed upon a particular

(1) 1 D. F. & J. 93. 6 Jur
NS 329.
(2) 2 Atk. 215
(3) 5 Ves. 79, 85.

sum which he thinks is a proper portion for his child, in the same way as you may do in the case of a legacy where he leaves a child a specific sum, as for instance £10,000. In that case you may consider that the father had in his own mind that £10,000 is a sufficient portion for that child, and when he subsequently gives a sum of £5000 to that child it is considered that he has not altered his mind as to the £10,000 being a sufficient portion. But it is difficult to assume from a mere gift of residue to a child that the father has come to a fixed determination as to what sum shall be sufficient for his fortune. Still you may imply this, that if he divides his residue equally among his children, he does not intend to prefer one child above the other. If from any special circumstances, from one child marrying or any other cause, he makes a gift to that child in his lifetime, the law, according to the rule acted upon in *Montefiore* v. *Guedalla* (1), which I agree with Lord Justice *Knight Bruce* was good sense as applied to that case, is, that you are not to assume that the testator in making that gift shewed any alteration of his intention as respects the equality of the children. If the rule is that we are to carry out what the testator intends, it is clear that when he makes a gift in his lifetime, as in this case, he does intend to take away from the residue which he had given to the stranger. It cannot possibly be disputed that if the testator had given to his widow a life interest in the whole of the residue, the fact of making a gift in his lifetime to a child, just as to anybody else, must have had the effect of diminishing that residue; and it certainly appears to me contrary to reason to hold that if, instead of having given his wife a life interest in the whole residue, he gives her a life interest in the half, and then makes presents to children, she is in that case to have a life interest in that which he meant the child to enjoy immediately. It appears to me, therefore, that the decision of the Vice-Chancellor is in accordance with good sense, and not inconsistent with the authorities, and that the appeal must be dismissed.

Solicitors for the Plaintiff: Messrs. *Freshfield*.

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle*; Messrs. *Kimber & Ellis*.

(1) 1 D. F. & J. 93. 6 Jur. N.S. 329

L. JJ.

1872

July 18, 19.

HIGGINBOTHAM *v.* HAWKINS.

[1870 H. 239.]

Waste—Deceased Tenant for Life—Injunction—Account—Statute of Limitations.

A tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both having committed waste by cutting timber:—

Held, that the *Statute of Limitations* began to run against the remaindermen in fee from the time when the timber was cut, and not from the time of the death of the tenant for life:

Held, that though an injunction and an account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her executrix for waste committed by the preceding tenant for life.

Decree of *Bacon*, V.C., varied.

MARY HIGGINBOTHAM, by her will, devised certain lands at *Alresford*, in the county of *Essex*, to the use of *Harriet Higginbotham* and her assigns during her life without impeachment of waste except voluntary waste in cutting down any timber other than such timber as might be required for the repairing of the buildings; with remainder as to one moiety to the use of *Elizabeth Jones* and her assigns during her life without impeachment of waste except as aforesaid, with remainder to the use of *G. Higginbotham* and *W. Higginbotham* as tenants in common in fee; and as to the other moiety to the use of trustees during the life of *Ann Becket* without impeachment of waste except as aforesaid; with remainder to the use of the eldest daughter of *Ann Becket* in fee.

Mary Higginbotham died in 1856, and *Harriet Higginbotham*, the first tenant for life, died in September, 1865, leaving as her executrix *Elizabeth Jones*, who was the second tenant for life of one moiety.

On the 27th of August, 1870, *G. Higginbotham* and *W. Higginbotham*, the remaindermen in fee of one moiety, filed their original bill against *Elizabeth Jones*, as tenant for life of one moiety, and the other persons interested in the estate, alleging that trees had been felled and sold by *Elizabeth Jones* and the trustees of *Ann Becket*, and that other acts of waste were threatened, and praying for an injunction, and for an account of timber cut.

On the 2nd of March, 1871, the Plaintiffs amended their bill, introducing charges against *Elizabeth Jones*, as executrix, in respect of timber cut in the lifetime of *Harriet Higginbotham*, and praying further that an account might be taken of what had come to the hands of *Harriet Higginbotham*, and of *Elizabeth Jones*, as well as executrix of *Harriet Higginbotham* as in her own right, and for payment of what might be so found due to the Plaintiffs.

Several defences were made to this suit, the Defendants contending that no waste according to the will had been committed; and *Elizabeth Jones* contending that there was no right in equity against her as executrix of *Harriet Higginbotham*; and that if there was, still any claim against the estate of *Harriet Higginbotham* was barred by the *Statute of Limitations*, no timber having been shewn to have been cut in her lifetime within six years of the bill being amended as against her representative, and, moreover, it being shewn that the remaindermen were at the time aware that the timber was cut, and complained about it.

The Vice-Chancellor *Bacon* was of opinion that waste had been committed, and granted an injunction and an account of all timber cut since the death of the testator (1).

Elizabeth Jones appealed.

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(1) 1872. March 19. WN(72)72

SIR JAMES BACON, V.C., said he had no doubt that the Plaintiffs were entitled to a decree as the case of waste had been made out. His Honour then said :—

Now it has been argued that there can be no remedy against the estate of the late *Harriet Higginbotham*, and the *Statute of Limitations* has been relied upon as an answer to the Plaintiffs' claim in that and in other respects. *Harriet Higginbotham* died less than six years before the filing of the bill; the statute, therefore, in no sense could be an objection to the claim which is made against her estate, the charge being that she, while she was tenant for life, had despoiled the estate by converting a part of the inheritance to her own use, and so much therefore her estate is liable to make good to the persons interested in the inheritance. As to that I have not heard any answer, except that it was suggested by Mr. *Fischer* that *Gent* v. *Harrison* (Joh. 517) (a) was an authority to shew that the remedy, if any, was a remedy at law, and that there could be no claim made in this Court upon any equitable grounds. Now the case of *Gent* v. *Harrison* is by no means an authority for that proposition. In that case the tenant who had come into possession of the estate complained that, by the

(a) 5 Jur. N.S. 1285.

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Mr. *Fischer*, Q.C., and Mr. *Key*, for the Appellant :—

The right of the reversioner to recover the value of timber cut is a legal right, and has in this case been barred by the lapse of time, which began to run, not from the death of the tenant for life, but from the cutting of the timber : *Garth* v. *Cotton* (1) ; *Gent* v. *Harrison* (2). At all events the Plaintiffs have no remedy in equity against the estate of *Harriet Higginbotham ;* the only equity in these cases is the right to an injunction to which the right to an account is attached, and that fails when the tenant for life is dead : *Jesus College* v. *Bloome* (3) ; *Seagram* v. *Knight* (4). No doubt the present tenant for life is also the executrix of the deceased tenant, but that is an accident.

THEIR LORDSHIPS were of opinion that waste had been committed, and only called upon the Respondents as to the waste committed during the life of the former tenant for life.

Mr. *Eddis*, Q.C., and Mr. *Marten*, for the Plaintiffs :—

We have a right to follow the money into any hands in which we may find it, and to restore that which has been taken from the estate. *Elizabeth Jones* is properly brought before the Court, and

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wrongful act of the former tenant for life, the estate had been turned into money, and had been invested, that the proceeds of the investment had been received by the then tenant for life, and that the money so received was the Plaintiff's. The answer to that was that he might bring an action for money had and received. How could the Plaintiffs here bring any such action ? They have no right to the income of any fund, for the timber has been taken from the estate ; nor is there any analogy that I can see between *Gent* v. *Harrison* and the present case. I am of opinion that the estate of *Harriet Higginbotham* is liable for all that she had done in her lifetime by means of the wrongful cutting, selling, and dealing with the timber.

His Honour then said that the Plaintiffs were entitled to an account of all the timber cut. If the Defendant had any case for allowance to be made to her for what she had done to the benefit of the estate, she could shew that on the inquiry. It was said that the amount of timber cut was very small, and ought not to have been the subject of a suit. But that did not at present appear, and the case must come on again for further consideration.

(1) 1 Wh. & T. L. C. 3rd Ed. 623, 660.

(2) Joh. 517. 5 Jur NS. 1285.

(3) 3 Atk. 262.

(4) Law Rep. 2 Ch. 628.

must account. In *Duke of Leeds* v. *Earl Amherst* (1) the right was held to have accrued at the death of the tenant for life.

Mr. *Kay*, Q.C., Mr. *Rodwell*, and Mr. *Field*, for other Defendants.

SIR W. M. JAMES, L.J.:—

In this case the bill was filed by the reversioners under a will, and prayed for an injunction and for an account of timber felled. The injunction was granted, as it appeared that there was legal waste committed by felling trees beyond what was authorized by the will. But what was principally argued before us was with respect to the timber cut during the lifetime of the preceding tenant for life.

Now the mere fact that the present tenant for life was also the executrix cannot make any difference; and to so much of the suit as seeks an account of what was received by the preceding tenant for life there appear to be two answers. In the first place, it is clearly established that a bill will not lie for an account of timber felled any more than for any other money demand, except when the account is asked as incident to an injunction, and that where the Plaintiff has no right to an injunction he has no right to an account, and his remedy is at law alone. In this case the account prayed against the estate of the deceased tenant for life is not incident to the injunction against the present tenant for life.

The second answer is, that the claim is barred by the statute. Beyond all question it appears that there was an immediate right of action. Legal waste had been committed, and the right of action accrued when the wrong was committed, at which time the reversioners might have brought their action for money had and received.

Therefore, in my opinion, the bill has entirely failed so far as regards the account against the estate of *Harriet Higginbotham* or her executrix in regard to what was done in her lifetime.

As to what was received by Miss *Jones* after the death of *Harriet Higginbotham*, she is answerable, and she appears to have received all the money. The Plaintiffs are entitled to half of what Miss *Jones* has so received, and the other half belongs to the

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(1) 2 Ph. 117.

L. JJ.
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family of Mrs. *Becket.* The sums are very small, and the Lord Justice and I are of opinion that we have materials enough to fix the amounts without putting the parties to any further expense. [His Lordship then stated the amounts.] As the suit has partially failed, there will be no costs.

Sir G. Mellish, L.J., concurred.

Solicitors: Messrs. *Bell, Brodrick, & Gray;* Mr. *J. B. Towse;* Messrs. *Field, Roscoe, & Francis.*

L. JJ.
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June 19.

GRAY *v.* SECKHAM.

[1871 G. 1.]

Surety—Promissory Note—Winding-up—Share of Dividends.

1 Ex D 157, 160
163, 5, 8,
3 Ch D. 449.
17 Ch D 161
8 App Cas 734

Four directors of a company, by way of security for any balance which might be due from the company to a bank, gave the manager of a branch of the bank their promissory note for £2000, and the manager indorsed the note to the bank. The company was wound up. The bank proved in the winding-up for £3659 as due by the company to the bank, and was declared entitled to a dividend of £1051 on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank £2067 for debt and interest due on the note:—

Held (affirming the decision of *Bacon*, V.C.), that the giving the note was in pursuance of an ordinary contract of suretyship, and that the surety who had paid the £2067 was entitled to receive from the bank a share of the dividend, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank.

The rule established by *Ex parte Turner* (1), that in similar cases in bankruptcy the sum paid by the surety is, in calculating the proportions of dividend, to be considered as expunged, does not apply to cases in winding up.

At the time of making the promissory note mentioned below, the *London and County Banking Company* were the bankers of the *Gelynog Llantwit Colliery Company, Limited.*

On the 10th of May, 1865, *S. L. Seckham* and three other directors of the *Colliery Company* made a promissory note, by which they promised to pay to another director, *H. Strong* (who was manager of a branch of the bank), or order, the sum of £2000.

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(1) 3 Ves. 243.

This note was made for the accommodation of the *Colliery Company*, and for the purpose of being transferred to the bank as a security for any balance which might be due from the *Colliery Company* to the bank; and the note was accordingly indorsed by *Strong* to the bank.

On the 20th of July, 1866, an order was made for winding up the *Colliery Company*, and £3659 was on the 7th of December, 1867, found in the winding-up to be the balance due by the *Colliery Company* to the bank. On this sum of £3659 a dividend of £1051 became payable to the bank in the winding-up.

In 1868 an action on the note was brought by the bank against *Seckham*, in which action judgment was obtained; and in 1870 *Seckham* paid the bank £2067, principal and interest due on the note.

Seckham then claimed so much of the dividend of £1051 as was due in respect of £2067. The bank, on the other hand, claimed all the dividends coming to them in the winding-up until they had received full payment of the sum due to them.

The question was brought before the Court on a special case; and the Vice-Chancellor *Bacon*, on the 26th of January, 1872, decided that *Seckham* was entitled to a part of the dividend received, the bank taking thereout so much as would make up the proportion which they would have received upon the residue of the debt proved beyond the £2067 if that £2067 had been expunged, and *Seckham* taking the remainder.

The bank appealed.

Mr. *Amphlett*, Q.C., and Mr. *Benjamin*, for the Appellants:—

There is a distinction between bankruptcy and winding-up, for in a winding-up the claim of the creditor is settled, and he is entitled as a creditor for the whole of that claim until he has been fully paid. That does not interfere with his right to proceed and recover what he can by other means: *Kellock's Case* (1). The bank proved for the £3659, and having done so, proceeded to realise their other securities, relying all the time on receiving all the dividends until the debt was fully paid. The bank, in entering into the transaction, intended to get what they could out of

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(1) Law Rep. 3 Ch. 769.

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the colliery, and if there was any deficiency, to come upon the surety. Until the bank is fully paid, what right has the surety to call upon the bank for anything? This was the very object of the arrangement, and on the faith of it the money was advanced by the bank.

The dividend is distributed over the whole debt, and the surety will get the benefit when we are fully paid: *Bardwell* v. *Lydall* (1). The £2067 is no portion of the debt due by the company, and *Seckham* could not have sued the company or have proved in the winding-up. How, then, can he receive a dividend? He did not give any security to the bank, for he merely joined in giving a note to *Strong*; and as between the bank and the colliery he cannot be regarded as a surety, so as to come within the ordinary rules.

[They referred to *Ex parte Turner* (2); *Ex parte Rushforth* (3); *Paley* v. *Field* (4).]

Mr. *Kay*, Q.C., and Mr. *R. E. Turner*, for Mr. *Seckham*, were not called upon.

SIR G. MELLISH, L.J.:—

This is an appeal from a decision of the Vice-Chancellor *Bacon* on a special case. [His Lordship then stated the questions asked by the special case.] The Vice-Chancellor has decided that Mr. *Seckham* is entitled to a portion of the dividend on the £3659, and I am of opinion that his decision is correct.

We have to consider two questions—first, whether evidence can properly be given that this contract by the directors was really a contract of suretyship; and secondly, if it was a contract of suretyship, then, whether from the form of contract or from the circumstances stated in the special case, we can infer that Mr. *Seckham* agreed that, on the colliery company being wound up, any dividend he might otherwise be entitled to should go to the bank until the bank had received 20*s.* in the pound on the debt which might be due from the company to the bank.

Now, as to the facts of the case, it appears to me beyond all question that this is simply the ordinary case of a customer proposing to overdraw his account at a bank, and offering as security the promissory note of third persons. I am of opinion that it makes no difference at all that the company are not themselves parties to the note. I am also of opinion that the form of the note makes no difference, for the agreement was in substance that the directors were to give this as a security for the payment of the balance due.

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(1) 7 Bing. 489.

(2) 3 Ves. 243.

(3) 10 Ves. 409.

(4) 12 Ibid. 435

Then comes the question whether that was a security for a part of the debt. It seems to be admitted that, if it was only a security for part of the debt, then, if one of the makers of the note has paid the amount, he is entitled to the benefit of the dividend *quoad* that part. Yet it was argued, in the first place, that this was not a security for a part of the whole debt of £3659, but was simply a security for the balance which might remain unpaid.

I am of opinion that it was really a security for a part. The question, if it arose in a Court of Common Law, would simply be, what was the consideration for this note? It is quite plain that there was no consideration at all as between the four directors who signed the note and Captain *Strong*, nor between Captain *Strong* and the bank. The bank never advanced any money or gave any consideration to Captain *Strong*, and the only consideration for the note is the balance which might from time to time be due from the company to the bank. Therefore it was a note given by third persons, the only consideration for which was a debt to be due, not from any person who signed the note, but from the company; and the bank has so treated it, because the company having been ordered to be wound up, the bank brought their action against Mr. *Seckham* on his liability, and recovered from him the whole sum.

Upon this the question arises, whether there is anything to take this case out of the ordinary rule that, when a surety is only surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged. 1 Ch. D. 188

I cannot see that there is anything to take this case out of the ordinary rule. No doubt it is now not unusual for contracts of

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guarantee to be expressly worded so as to shew that it is intended that such dividends may be kept; and of course by express words such a charge may be effected, as was done in the case of *Midland Banking Company* v. *Chambers* (1). The question for us to decide is whether such an agreement has been entered into. We cannot infer this from the simple fact that the instrument of suretyship is in the ordinary form of a promissory note. No doubt by the form of the note the persons who sign the note appear, so far as the note is concerned, to be the principal debtors; but it may be always given in evidence what the consideration of the note really was, and here it appears that the only consideration for the note was a debt due from third parties.

The truth is that the introduction of such provisions into contracts for suretyship is a modern invention; and certainly suretyship by a promissory note is far older than those provisions, and has existed as long as promissory notes have been used in this country.

I am therefore of opinion that this case comes within the ordinary rule, and I do not think that there is in this respect any difference between a bankruptcy and a winding-up; for in the winding-up of a company it is obvious that there must be a settlement of every possible claim against the company.

Then Mr. *Seckham* having, at the request of the company, and for their interest, executed this promissory note, and having paid the £2067, he is a creditor of the company for that amount; and he would be entitled to prove against them for it. It is quite clear that the bank cannot also be entitled to prove, because if they were, the company would be paying the dividend twice over on the same debt. Then the question is, which of the two is entitled to the dividend? It is quite obvious that Mr. *Seckham*, not having pledged that dividend, is the person who is entitled to receive it, he having in fact paid the bank, and the bank having received from him that part of the debt which was due to the bank.

Upon the whole, I am of opinion that the decision of the Vice-Chancellor was right, and that this appeal must be dismissed with costs.

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(1) Law Rep. 4 Ch. 398.

Sir W. M. James, L.J. :—

I am of the same opinion. The distinction which has been raised between making a promissory note as surety to a bank, and making a promissory note and depositing it as security to the bank, is too subtle for me.

The Respondents then asked that the order made by the Vice-Chancellor might be varied by directing that Mr. *Seckham* should receive the proportion of dividend due on the sum paid by him without considering the sum paid by him as having been expunged.

Sir W. M. James, L.J. :—

I am of opinion that this order must be rectified in the way suggested. The cases, *Ex parte Turner* (1) and *Ex parte Rushforth* (2), were cases under the bankruptcy laws, and it is quite clear that they may be explained by reference to the then state of the law as to payments by sureties. In the then state of the law a surety paying a debt after the bankruptcy had no means whatever of proof, though he was entitled to his remedy against the bankrupt to whom the certificate was no discharge. That was the remedy of the surety, and one can easily understand that it would be according to common sense and common equity for the principal creditor to claim the same rights as if the surety had paid the debt. But I cannot understand how it is possible to apply the principle not to a case of bankruptcy but to a case of winding-up, which is the administration of an estate exactly similar to the administration of the estate of a deceased person. In that case, whether the debt is paid at one moment or at another does not in the slightest degree affect the right of proof against the estate, which has always been liable to exactly the same amount of dividend. I am of opinion that there is no analogy in this respect between the cases of bankruptcy and winding-up. It is clear that no harm could, in any conceivable state of things, be done to the creditor by the mode in which the debt was paid, either at one particular moment or another; and therefore there is no ground for making the deduction

(1) 3 Ves. 243.

(2) 10 Ves. 409.

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which has been directed by the order made. The point is not raised by the special case, and I am quite sure that if it had been, it would not have been considered reasonable.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears to me that there is a great deal of difference between the winding-up of a company and an ordinary bankruptcy, in this respect, that every possible claim and demand against the company has to be settled under the winding-up. Now here, directly the debt of £2067 was paid, there was a debt due from the company to the surety who paid it. It appears to me that he must be entitled to receive the whole of the dividend in respect of that debt, and I do not see what equity there is to deprive him of that part which he is deprived of by the order of the Court below.

The order of the Court below must be affirmed with this variation, and the Appellants will pay the costs of the appeal.

Solicitors for the Bank: Messrs. *Stevens, Wilkinson, & Harries.*
Solicitors for Mr. *Seckham:* Messrs. *Taylor, Mason, & Taylor.*

L. JJ.
1872
July 6.

KETTLEWELL *v.* BARSTOW.

[1868 K. 50.]

Practice—Production of Documents—Pedigree.

9 Ch 367
20 ChD 486

The Plaintiff filed his bill to establish his title by descent to lands of which *A. F.* died seised in fee. The bill stated that *A. F.* acquired part of the lands by descent from her maternal grandmother, *S. F.;* that the last purchaser of these estates was an ancestor of *S. F.*, and that the Plaintiff was heir-at-law of such ancestor, and also of *A. F. ex parte maternâ*, and that *A. F.* had died intestate, and that the Plaintiff was lineally descended from the great-grandfather of *A. F.*, and was her heir-at-law. The Defendants pleaded a denial of the Plaintiff's heirship in bar to all the relief, and to all the discovery except to so much of the bill as sought discovery whether the Plaintiff was lineally descended from *A. F.*'s great-grandfather. Issues were directed as to the Plaintiff's heirship. After this, the Plaintiff having applied for production of documents, the Defendants by their affidavit admitted the possession of a pedigree, which they had covered up, except so much of it as shewed the direct line from *S. F.* to *A. F.*; and the Defendants stated by their affidavit that the covered part evidenced or related to their own title only, and did not evidence or tend to make out the title claimed by the Plaintiff, or any link therein:—

Held (reversing the decision of *Bacon*, V.C.), that a pedigree was not to be looked upon as one indivisible document of which the Plaintiff was entitled to see the whole, and that the parts covered were sufficiently protected by the affidavit.

The Defendants objected to produce other documents on the ground that persons not parties to the suit were interested in them:—

Held (affirming the decision of *Bacon*, V.C.), that this was no ground for resisting production.

The Defendants objected to produce other documents on the ground that they did not relate to any issue or matter to be tried at the hearing, but were documents to the production of which the Plaintiff would be entitled by way of consequential relief if he succeeded on the trial of any of the issues, but not in any other event:—

Held (reversing the decision of *Bacon*, V.C.), that these documents were protected.

THIS was a motion by the Defendants, the *Barstows*, by way of appeal from part of an order of Vice-Chancellor *Bacon*.

The bill stated that *Ann Fawcett* was, at her death, seised of certain, and also equitably entitled to other, freehold hereditaments in the parishes therein mentioned and elsewhere in the county of *York*, and seised for an estate of inheritance of some, and equitably entitled to other, copyhold hereditaments in those parishes and elsewhere in the county of *York*: that *Sarah Fawcett*, the maternal grandmother of *Ann Fawcett*, was, before her marriage with her husband *William Fawcett*, *Sarah Kettlewell*, spinster, and that *Ann Fawcett* acquired some parts of the said freehold and copyhold hereditaments by descent from her: that the last purchaser of these estates was an ancestor of *Sarah Fawcett*, *ex parte maternâ*, and that the Plaintiff was heir-at-law of such ancestor and of *Ann Fawcett*, *ex parte maternâ*: that *Ann Fawcett* was, at her death, equitably entitled in fee simple to certain freehold estates, and equitably entitled to certain copyholds, which, by the settlement made about 1820 or 1822, on the marriage of her father and mother, were conveyed and assured to trustees, upon trusts under which, upon the deaths of the father and mother, an undivided moiety had devolved upon *Ann Fawcett* in fee, and the other moiety upon her sister *Elizabeth Fawcett* in fee: that *Elizabeth*

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Fawcett married one *Jeremiah* or *John Barstow*, but no settlement was made on their marriage: that *Elizabeth Barstow* died in 1844 without issue in the lifetime of her husband, and without having executed any deed altering the devolution of her real estate, and that her moiety devolved upon *Ann Fawcett* as her heiress-at-law: that *Ann Fawcett* died in 1856 a spinster and intestate, leaving the Plaintiff her heir-at-law, and that the Plaintiff was lineally descended from the great-grandfather of *Ann Fawcett*, and was her heir-at-law both *ex parte paternâ* and *ex parte maternâ*, and also her customary heir: that after the death of *Ann Fawcett* the Defendants, *B. Barstow*, *John Barstow*, and *William Fawcett*, obtained possession of her estates: that the Defendants alleged (contrary to the fact) that *Elizabeth Barstow* had made a valid disposition by will of her moiety of the estates comprised in her mother's settlement, in favour of her husband, and that the Defendants, the *Barstows*, claimed such moiety through him, and that the Defendant *Fawcett* claimed the other moiety of those estates, and the entirety of *Ann Fawcett's* other lands as her heir-at-law, but that, nevertheless, *Fawcett*, in 1859, fraudulently obtained admittance to the copyholds as heir of *Ann Fawcett*, on the allegation that *Elizabeth Barstow* had died intestate, and that her moiety had descended on *Ann Fawcett*, and by the false representation that he was the heir of *Ann Fawcett*: that the Defendant *Fawcett* availed himself of his name to pretend to be heir of *Ann Fawcett*, though he and the other Defendants knew that he was not related to her, and the Defendants knew that the Plaintiff was her heir: that the Defendants had obtained from the trustees of the settlement a conveyance of the legal estate in part of the property comprised in the settlement so that the Plaintiff could not try his right at law: that the Plaintiff had commenced actions of ejectment to recover parts of the estates, including portions of the estates comprised in the settlement, but by reason of the fraudulent detention of the settlement and other title-deeds, and the fraudulent conveyance of the legal estate from the trustees, the Plaintiff could not safely proceed to trial. The bill prayed that it might be declared that the admittance of the Defendant *Fawcett* to the copyholds was obtained by a fraudulent representation, and that the Defendants might be decreed to deliver up possession to the Plaintiff, and that the Defendants might set forth a full particular of the deeds and documents relating to the estates of *Ann Fawcett*, and that such title deeds might be brought into Court and used by the Plaintiff for the purposes of the actions of ejectment and in the prosecution of the suit. The bill also prayed for a discovery in whom the estates were vested, and by what assurances; for a delivery of the deeds to the Plaintiff on his establishing his title; for an account of rents; and for a receiver.

William Fawcett having died the suit was revived against *Thomas Fawcett* and *William Fawcett* the younger, as representing him.

In May, 1869, the *Barstows* filed a plea and answer, by which they pleaded in bar to so much of the bill as sought any relief against or discovery from them, or either of them, with reference to or in connection with any property which the Plaintiff, by his bill, claimed to be entitled to or interested in as heir-at-law *ex parte paternâ* of *Ann Fawcett*; that the Plaintiff was not at the death of *Ann Fawcett*, and had never been, and was not now the heir-at-law *ex parte paternâ* of *Ann Fawcett*. As to so much of the bill as sought any relief against or discovery from these Defendants, or either of them, with reference to or in connection with any property which the Plaintiff, by his bill, claimed to be entitled to or interested in as heir-at-law *ex parte maternâ* of *Ann Fawcett*, except only so much of the bill as sought to have it discovered whether *Sarah Fawcett* in the bill named was not, before her marriage with her husband *William Fawcett*, *Sarah Kettlewell*, spinster, and also except so much and such part of the bill (if any) as sought discovery whether the Plaintiff was or not lineally descended from the great-grandfather of the said *Ann Fawcett*, they pleaded in bar that the Plaintiff was not at the time of the death of *Ann Fawcett*, and had never been, and was not now the heir-at-law *ex parte maternâ* of *Ann Fawcett*. There was a similar negative plea as to the copyholds, that the Plaintiff was not the customary heir of *Ann Fawcett*. Then as to all the bill, except so much and such parts thereof as they had already pleaded to, and except so much and such part thereof as was thereinbefore excepted, they pleaded that the Plaintiff was not at the time of the death of *Ann Fawcett*, and never had been, and was not now

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the heir-at-law of any ancestor *ex parte maternâ* of *Sarah Fawcett*, who was the last purchaser of any hereditaments which *Ann Fawcett* died seised of by descent, or in any manner entitled to by descent, from *Sarah Fawcett*, or of any other hereditaments whatsoever which *Ann Fawcett* died seised of or entitled to.

The Defendants answered so much of the bill as sought discovery as to the matters excepted from the pleas, by stating their ignorance whether *Sarah Fawcett*, in the bill alleged to be the maternal grandmother of *Ann Fawcett*, was, before her marriage, *Sarah Kettlewell*, or whether the Plaintiff was lineally descended from the great-grandfather of *Ann Fawcett*.

On the 30th of June, 1870, an order was made directing issues to be tried at the hearing on evidence *vivâ voce*—(1). Whether the Plaintiff was, at the death of *Ann Fawcett*, her heir *ex parte paternâ*. (2). Whether he is now her heir *ex parte paternâ*. (3—6). Similar issues as to heirship *ex parte maternâ* and customary heirship. (7 and 8). Issues as to the Plaintiff's heirship to any ancestor *ex parte maternâ* of *Ann Fawcett* who was last purchaser. (9). Whether the Plaintiff was lineally descended from the great-grandfather of *Ann Fawcett*.

The Plaintiff having applied for production of documents, the *Barstows*, in January, 1872, filed an affidavit with a schedule of documents, but objected to produce those in the second part of the schedule, on the following grounds:—

(1). As to documents under the head A, "on the ground that the same documents, and every of them, evidence or relate to our own title or the title of the Defendants *T. Fawcett* and *W. Fawcett* only, and do not evidence, make out, support, or tend to make out, support, or in any other manner relate to any estate, right, title, pedigree, or heirship whatsoever claimed by the Plaintiff, or any part or link of or in the same."

(2). Documents under head B. "Two copies pedigree of *William Fawcett*." The Defendants objected to produce these except as sealed up, "on the ground that such parts thereof as we have caused to be sealed up evidence or relate to our own title or the title of the said co-Defendants only, and do not evidence, make out, support, or tend to make out or support or in any other manner relate to any such estate, right, title, pedigree, or heirship as

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aforesaid claimed by the Plaintiff, or any part or link of or in the same, or do not relate to the matters in question in this cause."

The part left uncovered was the pedigree from *Sarah Fawcett* down to *Ann Fawcett*, everything else being sealed up.

(3). Documents C. "On the ground that the same are in the nature of confidential communications, and are of the several descriptions more particularly set forth in the part of the said schedule, which is contained under the heading C."

(4). Documents D. "On the ground that divers persons not parties to this suit are interested therein respectively, and we have to the best of our knowledge, information, and belief particularly set forth under the said heading the nature of such interest, and the names and conditions in life of such persons respectively."

(5). Documents Y. "On the ground that the same do not nor do any of them relate to any issue or matter to be tried at the hearing of this cause; but, as we are advised and say, consist exclusively of documents which the Plaintiff will be entitled to the production of by way of consequential relief, in the event of his succeeding in any of the first six issues in the cause; but not in any other event, as more fully appears by the description which we have given under the same heading of such documents respectively. And we are advised and submit that, for the present purposes of this suit, such documents are immaterial." The bulk of the documents under this heading were title-deeds which had belonged to *Ann Fawcett*.

The Plaintiff took out a summons to consider the sufficiency of this affidavit, asking to have the pedigree unsealed, and to have the documents A, C, D, and Y produced for inspection, except those since the commencement of the litigation.

Vice-Chancellor *Bacon* held that a further affidavit must be made as to A and C, the descriptions in the schedule not being sufficiently particular. That the pedigree must be unsealed and produced, and that documents D and Y were not protected (1).

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(1) 1872. April 26. WN(1872)95.

SIR JAMES BACON, V.C.:—

With regard to D, the objection does not go far enough. To say that other persons are interested is no ground for resisting production.

As to the pedigree, the Plaintiff is clearly entitled to production. He is not obliged to take the Defendant's word that the parts sealed up do not

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The order drawn up was that the Defendants should file a further affidavit, should uncover and produce the pedigree, and that the documents A, C, D, and Y, except certain bundles of papers of which particulars were to be given in the further affidavit, and except documents since the commencement of the litigation, were to be produced for inspection.

Mr. *Eddis*, Q.C., and Mr. *Russell Roberts*, for the appeal motion:—

We are not bound to disclose anything which, as we swear, is evidence of our own title, and does not relate to that of the Plaintiff: *Wigram* on Discovery (1); *Firkins* v. *Lowe* (2); *Compton* v. *Earl Grey* (3); *Lady Shaftesbury* v. *Arrowsmith* (4); *Minet* v. *Morgan* (5). We object to produce the documents under the head D, on the ground that other parties not before the Court are interested in them: *Taylor* v. *Rundell* (6); *Bovill* v. *Cowan* (7). We object to produce those under head Y, on the ground that their production is not wanted for the hearing, and is matter of consequential relief if the Plaintiff obtains a decree: *Turney* v. *Bayley* (8); *De la Rue* v. *Dickinson* (9). A pedigree cannot be looked upon as a single document; it may relate to several branches in some of which the Plaintiff may have no interest; and our affidavit, which would be sufficient to protect separate documents, is enough to protect the parts which we have sealed up.

Mr. *Kay*, Q.C., and Mr. *Cottrell* (who had been informed by the

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relate to his case. It is one entire document, which he is entitled to have unmutilated and unconcealed. It is not like a book containing a variety of accounts, some of which may relate to the suit and others not; or a press copy letter-book containing a variety of unconnected letters.

Then Y, it is said, consists of documents which the Plaintiff may be entitled to at the hearing, but which he is not entitled to now as they do not relate to any issue or matter to be tried at the hearing. That is no reason why they should not be produced. The case in which the Plaintiff sued as a partner, and the partnership was denied, does not bear the most remote analogy to the present.

(1) 2nd Ed. p. 277.

(2) 13 Price, 193.

(3) 1 Y. & J. 154.

(4) 4 Ves. 66.

(5) Law Rep. 11 Eq. 284.

(6) Cr. & Ph. 104, 111.

(7) Law Rep. 5 Ch. 495.

(8) 12 W. R. 633. 4 De G. J. & S. 332.

(9) 3 K. & J. 388.

Court that they need not argue the point as to the documents C), for the Plaintiff:—

The documents Y are not sufficiently guarded by the affidavit: *Smith* v. *Duke of Beaufort* (1). The truth of the bill must at this stage be assumed for the present purpose: *Gresley* v. *Mousley* (2). A pedigree is a document which is inseparable, and the whole must be produced: *Hylton* v. *Morgan* (3); *Rumbold* v. *Forteath* (4). A similar principle was acted on in *Luscombe* v. *Steer* (5) and *Carver* v. *Pinto Leite* (6). The Defendant is not to be judge whether a document *primâ facie* relating to matters in the suit does not assist the Plaintiff's case.

The pedigree *ex parte paternâ* is material to the Plaintiff, because he, claiming *ex parte maternâ*, must exhaust the paternal line to make out his case.

SIR W. M. JAMES, L.J.:—

The documents classed under the head D are not protected. If documents are in the joint possession of the Defendants and a person not before the Court, their production will not be ordered, because the Court will not order the Defendants to do what they have no power to do; but it is no ground for resisting production that a person not before the Court has an interest in the documents. The documents Y are sufficiently protected, the Defendants having sworn positively that they do not relate to anything which has to be decided at the hearing. As regards the documents under the head A, the order appears to have been drawn up *per incuriam*, for the Vice-Chancellor, as appears by his judgment, intended to reserve his decision until a further affidavit had been made.

As regards the pedigree, it was contended that a pedigree is one entire document, of which the Plaintiff, if entitled to see part, is entitled to see the whole, and that the Defendants therefore cannot seal up any part of it. In support of this, Mr. *Kay* referred to authorities which seem to me to establish the contrary. One document of this nature may contain the pedigrees of several people—of the Plaintiff, of the Defendants, and of strangers to the

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(1) 1 Hare, 507; 1 Ph. 209.
(2) 2 K. & J. 288. 2 Jur NS 156
(3) 6 Ves. 293.
(4) 3 K. & J. 748, 752. 3 Jur NS 657
(5) 37 L. J. (Ch.) 119.
(6) Law Rep. 7 Ch. 90.

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cause. There is, therefore, no weight in that contention. The only question on which some doubt passed through our minds was whether some of the parts sealed up, though not containing the Plaintiff's pedigree, might not assist him in proving his case; but the Defendants have positively sworn that the parts which they have covered up do not relate to the Plaintiff's case. In a case like the present, where the Plaintiff gives no information as to his own pedigree, but merely states in his bill that he is heir *ex parte maternâ*, it would be very dangerous if he were allowed to enter upon a roving inquiry which might result in his finding flaws in the title of the Defendants for the benefit of somebody else. The Plaintiff is in substance saying, "If you shew me all your documents, I may find evidence which will enable me to turn you out of possession." Every document in the possession of the Defendants may in some indirect way help the Plaintiff to prove something; but before we can order this pedigree to be uncovered, after such an affidavit as the Defendants have made, we must see reason to believe that the covered part contains what would tend to prove something which the Plaintiff has to prove at the hearing.

SIR G. MELLISH, L.J.:—

I am of the same opinion. This case is one in which we ought to be very cautious as to ordering discovery. The intestate died in 1858 possessed of a considerable estate, and the Defendants are in possession both of the estates and the documents of title. The Plaintiff states his title in the vaguest way, so that one cannot help suspecting this to be a mere fishing bill, where the Plaintiff is not aware of any title in himself, but is trying to find out whether he has not one. The Defendants produce the pedigree of the family, and leave it uncovered so far as it relates to the direct line through which the Plaintiff claims, but cover up the rest on an affidavit that it does not relate to the pedigree of the Plaintiff, but either relates only to the pedigree and title of the Defendants, or does not relate to anything at issue in the cause. I cannot agree that a pedigree is to be taken, as agreements sometimes have been, as an indivisible document of which the whole

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must be produced. We do not know the Plaintiff's case, and cannot see that the discovery sought has any bearing upon it. The Defendants swear that it has not, and under such circumstances it ought not to be ordered, for its production might be very prejudicial to the Defendants, by disclosing something which would be mischievous to them in proceedings between them and third persons.

Solicitors: Messrs. *Johnson & Weatheralls*; Mr. *Hemsley*.

ROBEY & CO.'S PERSEVERANCE IRONWORKS *v.* OLLIER.

[1870 R. 148.]

L. JJ.
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July 20.

Lien—Equitable Assignment—Bill of Exchange drawn against Cargo.

18 Eq. 286
3 Ch D. 480
5 Ch D. 790

B. consigned to the Defendants by the ship *Acacia* a cargo which had been purchased at the joint risk of himself and the Defendants, and advised them of the particulars of bills which he had drawn against the cargo payable to his own order. The Defendants replied, promising to protect the bills. *B.* indorsed to the Plaintiffs three of these bills, which ran, "Pay to the order of myself the sum of £ sterling, which place to account cargo per *A.*" *B.* having stopped payment, the Defendants refused to accept the bills; but after selling the cargo, offered to pay to the Plaintiffs the surplus of the proceeds, after satisfying a balance due to them from *B.* on the general account between them. The Plaintiffs refused to accept this, and filed their bill, claiming a lien for the full amount of the three bills:—

Held (affirming the decision of the Master of the Rolls), that the Plaintiffs had no lien on the proceeds of the cargo.

Frith v. *Forbes* (1) discussed.

THIS was an appeal by the Plaintiffs from an order of the Master of the Rolls dismissing their bill, which was filed to establish a lien on the proceeds of a certain cargo.

In November, 1869, *F. C. Brown*, of *Ibraila*, in the *Danubian Principalities*, consigned to the Defendants a cargo of maize by the ship *Acacia*, and on the 9th of November sent to them a letter of that date, which, after stating that the bill of lading was inclosed,

(1) 4 D. F. & J. 409. 8 Jur. N.S. 1115.

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and that the invoice would be sent by the next post, proceeded as follows:—

"Against this cargo I beg to advise having drawn to account on your good selves as follows, under this day's date:—

No. 779	£200	3 m. date order myself.
780	230	
781	240	
782	250	
783	280	
784	300	
	£1500	

which please protect on presentation."

The bill of lading was not inclosed in this letter, but was sent to *Ollier & Co.* in another letter of the same date. The letter set out above was received by *Ollier & Co.* before the arrival of the bill of lading, and on the 15th of November they wrote to *Brown* as follows:—

"Your next will doubtless hand us bill of lading for the maize, as it was not included in your last. We confirm remarks in our last on the subject of the sale, and you may rely on our doing our best, and keeping a sharp look out about the weight, which we always find it necessary to do. Your drafts on account of this cargo shall have due protection."

On the 19th of November, 1869, the Defendants having received the bill of lading, sent to *Brown* a letter, which was in part as follows:—

"We confirm our last of 15th instant, and have yours of 9th with bill of lading, per *Acacia*, for 1350 quarters maize, and we await your next with invoice. Noting all you say about weight and days, which shall have our best attention. Your six drafts against this cargo, £1500 total, shall be duly honoured."

After receiving this letter, *Brown*, who was indebted to the Plaintiffs on account current, indorsed the last three bills, 782, 783, 784, to the Plaintiffs, and sent them to the Plaintiffs inclosed in the following letter:—

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"I beg to inclose herewith three drafts for

$$\left.\begin{array}{r}\pounds 250\\ 280\\ 300\end{array}\right\}\text{Order myself on Messrs. } \textit{Ollier \& Co.}\text{, of } \textit{London}\text{, at 3 m. date from 9th inst.}$$

$$\underline{}$$

£830

sterling, which at maturity please pass to my credit."

The bills were in the following form:—

"First.

"*Ibraila*, Nov. 9, 1869. Exchange for £250 sterling. At three months date of this, first of exchange; second and third not paid, pay to the order of myself the sum of £250 sterling value, which place to account cargo per *A.*, as advised by this day's post. "*Fredk. C. Brown.*

"To *Messrs. Ollier & Co.*
"No. 782."

The indorsement on each was—

"Pay to the order of Messrs. *Robey & Co., Limited*, value received. "*Ibraila*, Nov. 23, 1869.
"*Fred. C. Brown.*"

On the 6th of December, 1869, the Plaintiffs received the drafts and forwarded them to the Defendants, who returned them unaccepted, *Brown* having in the meantime stopped payment.

The Defendants having received and sold the cargo, the Plaintiffs filed their bill to establish a lien on the proceeds for the amount of the three drafts held by them.

Brown up to his stoppage had acted as agent at *Ibraila* for the Defendants, and he and the Defendants occasionally undertook speculations at their joint risk, though there was no general partnership between them. The purchase of the cargo of the *Acacia* was one of these joint speculations. The ordinary course of business was, that *Brown* consigned cargoes to the Defendants, and drew bills upon the Defendants against such cargoes. The Defendants kept a general account current with *Brown*, in which they debited him with the drafts drawn by him, and accepted by them, and credited him with the invoice price of the cargoes on their arrival; and when the purchase was at their joint risk he was

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credited with his share of profit or loss after the cargo had been sold. All consignments, whether on joint risk or not, were passed through this account current.

On the 3rd of November, 1869, the balance of this account was slightly against *Brown*, and several transactions at their joint risk were then pending. The Defendants alleged that on the account being balanced at the end of 1869, after these transactions had been wound up, the sum of £138 13*s.* 8*d.* only was due to *Brown*. This sum the Defendants before suit offered to pay to the Plaintiffs, who refused to accept it, and claimed the full amount of the three bills.

The Master of the Rolls dismissed the Plaintiffs' bill with costs, and from this order the Plaintiffs now appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Speed*, for the Appellants, relied on *Frith* v. *Forbes* (1) as governing the present case.

Mr. *Southgate*, Q.C., and Mr. *Miller*, Q.C., for the Respondents.

Sir W. M. James, L.J.:—

I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo it carries a lien on that cargo into the hands of every holder of the bill. In *Frith* v. *Forbes* there were grounds for saying that the intention was to give *Frith, Sands, & Co.* an equitable interest in the cargo, for the letters of the consignor to the consignees referred to bills of exchange which the consignor had drawn in favour of *Frith, Sands, & Co.* Here the reference is only to bills which the consignor had drawn to his own order, not mentioning any third parties. In *Frith* v. *Forbes* the cargo was the property of the consignor, who had full right to dispose of the proceeds as he pleased; here *Brown* was not the owner of the cargo but had only a joint interest in it. Moreover, his letters to the Defendants were not communicated to the Plaintiffs, who did not advance their money on the faith of them. I am of opinion, therefore, that the Plaintiffs have no such lien as they claim, and that their bill was rightly dismissed. The decision in *Frith* v. *Forbes* turned upon special circumstances, and can hardly be treated as governing any other case.

5 Ch D. 790

2 Ch D. 480.

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(1) 4 D. F. & J. 409. 8 Jur ns 1115

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1872
Robey & Co.'s Perseverance Ironworks v. Ollier.

Sir G. Mellish, L.J.:—

I am of the same opinion. The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words "which place to account cargo per *A.*," that he was to have a lien on that cargo. A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed; if there is no bill of lading annexed he only expects to get the security of the bill itself. In *Frith* v. *Forbes* (1) the Court considered that, taking all the letters together, there was an equitable assignment. Here *Brown* had no right to make an equitable assignment, and did not, in my opinion, purport to make one.

Solicitors: Messrs. *Stocken & Jupp*; Messrs. *Taylor, Hoare, & Taylor.*

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[1869 H. 16.]

L. JJ.
1872
July 12, 13, 15, 16, 17, 22.

[illegible]

Mines and Minerals—China Clay—Reservation—Rights of Mine Owner—Enfranchisement—Misdescription—Injunction—"Threaten and Intend."

In 1799 the Duke of *Cornwall*, as lord of a manor, granted the freehold in a copyhold tenement to the copyholder, reserving "all mines and minerals within and under the premises with full and free liberty of ingress, egress, and regress, to dig and search for, and to take, use, and work the said excepted mines and minerals," the deed not containing any provision for compensation. Under the tenement was a bed of china clay, the existence of which did not appear to have been contemplated by either party at the time, no china clay having ever been gotten out of the lands of the duchy, though the existence of tin was well known. It was admitted in the cause that china clay could not be gotten without totally destroying the surface, and the process of getting tin by "streaming," which was an ancient, and at the time of the grant the most usual, mode of getting tin, was almost equally destructive. A bill by the owner of the surface to restrain the owner of the minerals from getting china clay having been dismissed by *Wickens*, V.C., on the ground that the reservation included china clay with the power to get it:—

Held, on appeal, that the china clay was included in the reservations, but that the surface-owner was entitled to an injunction to restrain the owner of

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(1) 4 D. F. & J. 409. 8 Jur. N.S. 1115.

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8 CP 341.
8 Ch 655
10 Ch 398, 400
4 Ch D 679.
2 App Cas 409
5 Ch 755, 760-2
763.
— 949.
4 App Cas 296
307
12 Ch D 734
5 QBD 166
6 App Cas 469
20 Ch D 95
— 553-5,
21 Ch D 22-3-5
31, 23
22 Ch D 31-2
42
10 QBD 556
568
8 App Cas 568
512
841
11 QBD 830

the minerals from getting it in such a way as to destroy or seriously injure the surface.

When a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to shew clearly that he is intended to have that power.

The deed granted the property by the description of "All that copyhold tenement called *Greys*, consisting of a house with divers parcels of land, containing 103 acres (that is to say)" then followed parcels, concluding with "a parcel of land running with *G. Moor*, containing twenty-seven acres, which said tenement, called *Greys*, is now held for the life of *G. H.* by copy of Court roll":—

Held, that on the construction of this grant, a piece of uninclosed land, containing twenty-seven acres, and forming part of the waste of the manor, and proved never to have been a part of the copyhold tenement, did not pass, although there was nothing else to answer the twenty-seven acres mentioned in the deed, and the 103 acres could not be made up without it.

The Defendants *G.* and *I.*, who were entitled to the minerals under *Greys*, had granted a lease to their co-Defendants of the china clay under various lands, including great part of *Greys*. The lessees had entered *Greys* for the purpose of getting china clay, but had not got any, and long before the bill was filed had ceased to occupy any part of that estate, and were getting clay only from the twenty-seven acres of which the Plaintiffs claimed to be owners, but to which they were decided not to be entitled. The Defendants by their answers stated that they had no intention of getting clay at present out of *Greys*, but they insisted that they were entitled to do so:—

Held, that the Defendants "threatened" to get the clay so as to give the Court jurisdiction to interfere by injunction.

THIS was an appeal by the Plaintiffs from a decree of Vice-Chancellor *Wickens* dismissing the bill.

By deed or certificate of contract dated the 4th of January, 1799, under the hand of the Surveyor-general for the Duchy of *Cornwall*, and executed in accordance with the Acts for the redemption of land tax, the then Duke of *Cornwall*, as lord of the manor of *Treverbyn Courtenay*, conveyed to *Charles Rashleigh* the fee simple and inheritance of "All that customary or copyhold tenement, called *Greys*, with the appurtenances, parcel of the before-mentioned manor of *Treverbyn Courtenay*, consisting of a house, garden, farm-yard, mowhay and offices, containing by admeasurement 3R. 33P., with divers closes and parcels of ground, containing also by admeasurement 103A. 1R. 39P., or thereabouts (that is to say)" [here followed parcels, concluding with] "and a parcel of land running with *Garka Moor*, containing 27A. 2R., which said tenement called *Greys* is now held for the life of *John Hext*, gentleman, under the yearly rent of 15*s.* 3*d.*, by copy of court roll bearing date the 20th of September, 1771, together with all timber trees, and other trees, waters, watercourses, roads, ways, easements, commodities, profits, privileges, emoluments, and advantages whatsoever to the said several and respective premises belonging or appertaining." The deed contained the following exception and reservation:—

"Excepting nevertheless and always reserving unto his said Royal Highness the Prince of *Wales*, his heirs and successors, Dukes of *Cornwall*, all mines and minerals within and under the said several and respective premises, or any part thereof, together with full and free liberty of ingress, egress, and regress to and for his said Royal Highness, his heirs and successors, and his and their officers, agents, and workmen, and to and for the lessee or lessees of his said Royal Highness, his heirs and successors, and the agents and workmen of such lessee and lessees, into and out of the said several premises and every part thereof, with or without horses, carts, and carriages, to dig and search for, and to take, use, and work the said excepted mines and minerals."

In the next month *Rashleigh* conveyed the above premises to *Samuel Hext* (who was entitled to the copyhold interest in the property), his heirs and assigns. The Plaintiffs were the successors in title of *Samuel Hext*.

The Plaintiffs alleged that a certain part of *Garka Moor*, which was not inclosed, but was distinguished by certain landmarks, was the 27A. 2R. mentioned in the conveyance. This was distinguished in the bill as "the uninclosed part of the *Greys* estate." Under this land, as well as under the inclosures of the *Greys* estate, was a bed of china clay. The Defendants *Gill* and *Ivimey*, who had become entitled to the mines and minerals comprised in the above reservation, had granted in 1868 a lease to the Defendants, *Derry* and *Scott*, of the china clay under certain lands, including the twenty-seven acres and the greater part of the *Greys* estate. Under this lease *Derry* and *Scott* got a quantity of china clay from under that part of the moor which the Plaintiffs claimed as the uninclosed part of the *Greys* estate; and on one occasion, more than a year before the filing of the bill, they entered on some of the inclosed lands

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with the intention of getting china clay there, which intention however they almost immediately abandoned, and did not again enter. The getting of china clay is carried on by open workings, which cause an entire destruction of the surface, and it was admitted on both sides that the clay could not be got otherwise.

The Plaintiffs filed their bill alleging that the lessees threatened to enter, if they had not already entered, upon the *Greys* estate; as well the inclosed as the uninclosed parts thereof; and to commence working for china clay thereon. The plaintiffs charged that the china clay was not a mineral included in the reservation of mines and minerals, and that no one entitled to the mines and minerals under the reservation had any authority to get them by open workings. The bill prayed for an injunction to restrain the Defendants from getting china clay out of the *Greys* estate, and for an account of the china clay already gotten.

The Defendants *Gill* and *Ivimey*, by their answer, stated that in or about the reign of *Henry* VI. the ancient manor of *Treverbyn*, having devolved upon two co-heiresses, was divided into two manors, *Treverbyn Courtenay*, and *Treverbyn Trevanion*, and that certain ancient tenements of the manor of *Treverbyn* were allotted in severalty to the two new manors; but that the wastes, of which *Garka Moor* was part, were not so allotted, but were held in common. They went on to say that the *Greys* estate was allotted to *Treverbyn Courtenay;* that it consisted entirely of old inclosures, and that there was no uninclosed ground belonging to it; and that the manor of *Treverbyn Courtenay* was in 1799 the property of the Duchy of *Cornwall*, the manor of *Treverbyn Trevanion* belonging to another owner. In 1856 *Gill* and *Ivimey* purchased the manor of *Treverbyn Courtenay*, with all its rights and appurtenances; and in 1859 the manor of *Treverbyn Trevanion.* They thus became owners of the soil of the entirety of *Garka Moor.* They denied the title of the Plaintiffs to the uninclosed land alleged to form part of the *Greys* estate, and denied that any china clay had been gotten out of any land to which the Plaintiffs were entitled. They went on to say that the lessees had not "any present intention" of entering upon the *Greys* estate for the purpose of getting china clay or any other mineral; and that it was the desire of them (*Gill* and *Ivimey*) that the *Greys* estate "should not at present be interfered with;" and that *Derry* and *Scott*, in compliance with that desire, had abstained from interfering with it. But they (*Gill* and *Ivimey*) insisted that by reason of the reservation they were entitled to the china clay within the limits of the *Greys* estate, and to work for and get it by open pits and workings from the surface; such being, in fact, the only practicable mode of getting it. They alleged that open workings from the surface, by streaming for tin, had taken place from time immemorial on the *Greys* estate.

Derry and *Scott*, by their answer, said that they had entered on part of the *Greys* estate with the intention of getting china clay, which intention, at the request of *Gill* and *Ivimey*, they had almost immediately abandoned; and that having been requested by *Gill* and *Ivimey* to desist from working there, they had no present intention of entering upon the estate.

The Defendants also stated, by their answer, that they had not done any damage to the *Greys* estate except once, by accident, when a landslip took place into their workings close to the boundary of *Greys*.

The process of getting china clay was thus described in the Plaintiff's evidence; the correctness of which, in this respect, was not disputed:—

"Granite consists of quartz, felspar, and mica; and china clay consists of decomposed granite in which felspar exists in considerable proportions. To make china clay fit for the market, the felspar, which alone is merchantable, has to be separated from the other component parts of the said decomposed granite. The working for china clay is commenced almost in the same manner as quarrying for building stone, namely, by the removal of the soil covering the clay, which lies in beds of more or less thickness. The working is then carried on by turning a stream of water over the head of the clay, when so arrived at, and washing the same forward into channels and reservoirs; in which reservoirs the pure clay is held in solution, and separated from the impurities, by the same impurities, which are heavier, being precipitated to the bottom of the reservoir, while the pure clay is allowed to run forward, over the top of the reservoir, into a pit where it settles down, and is dried and made solid, either by exposure to the sun or by a drying kiln, after which it is fit for sale in the market. The injury done

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in clay working to the surface of the land is the total, or the almost total destruction of the surface where the excavations are made; for the clay is excavated to a depth which renders the land useless for agricultural purposes, either by the loss of all soil suitable for such purposes, or by reason of the cost of refilling and levelling the pits excavated being greater than any return to be obtained from the imperfect restoration of the land for agricultural purposes."

"Streaming" for tin appeared from the evidence in the cause to be the usual ancient way of getting tin in *Cornwall.* It was a process for obtaining grain tin by means of washing; and it was necessarily carried on entirely by means of open workings. There was some conflict of evidence as to whether the surface was irreparably destroyed by it; the Plaintiff's evidence going to shew that the land was often filled in and levelled, and the soil replaced when the working was over; and the Defendant's evidence making the destruction of the surface appear to be as complete as in the case of working for china clay. In modern times tin had been obtained by mining to a much greater extent than before. There was a conflict of evidence as to whether tin works had been carried on within the *Greys* inclosures. There was some evidence to shew that before the grant in 1799, china clay had been gotten in an adjoining parish, but it had never been gotten in the parish in which *Greys* was situate, nor was any gotten out of any of the lands of the duchy of *Cornwall* till some years after that time.

With respect to the twenty-seven acres, it appeared in evidence that the tenants of *Greys* had for a considerable number of years treated themselves as entitled to the exclusive use of it to this extent, that they alone cut the furze and took turf from it, and occasionally for the purpose of sale. It appeared also that the owners of other tenements took turf exclusively from certain other portions of *Garka Moor;* the twenty-seven acres not being fenced off, although distinguished by landmarks. There was a mass of conflicting evidence, upon the result of which the Court came to the conclusion that the twenty-seven acres did not in 1799 form part of the copyhold tenement called *Greys.* There was, however, nothing else answering to the 27A. 2P. mentioned in the conveyance, nor could the 103 acres be made up without including it.

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Vice-Chancellor *Wickens* considered that the terms of the reservation justified the Defendants in getting the china clay in the way in which they were getting it, and he dismissed the bill (1). The Plaintiffs appealed.

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(1) 1872. March 13. W.N.(72)73.

Sir John Wickens, V.C. :—

This case seems to me to turn upon the effect of the reservation contained in the deed of the 4th of January, 1799.

The cases which have been cited upon the construction of this reservation are very numerous and very embarrassing; the truth is, that the words here used became customary legal words in deeds when natural science was far less advanced than it is now, and that the problem, which has been found difficult by many Judges, has been to give them their proper meaning without doing great and obvious injustice.

The original meaning, probably, of the term "mines and minerals" was mines and substances got by mining; but etymology is a very unsafe guide to meaning, and I must hold that the word "minerals" long ago acquired a meaning of its own, independently of any question as to the manner in which the minerals themselves are gotten. Under the circumstances, however, there is no wonder that some inclination may be thought to have arisen on the part of Judges to give more weight than ought to have been attributed to some small circumstances of context, and to cut down the proper and ordinary meaning of the words "mines and minerals."

According to the evidence, kaolin or china clay is a metalliferous mineral, perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it is not commercially profitable to work in *England* for the purpose of extracting the metal from it. Therefore kaolin is excepted from the grant under which the Plaintiff claims, unless there can be shewn some custom of the country, something in the grant itself, or something in the reason of the thing, sufficient to induce the Court to consider the terms as used in a restricted and secondary sense. It was not suggested that I could recognise any custom of the country under which the term "mines and minerals" could have any definite meaning which would exclude kaolin, and I have failed to discover anything in the special expressions of this deed which would do so; the only words which appear to bear upon the point are "within and under." These words were commented upon by the Master of the Rolls in the case of *Midland Railway Company* v. *Checkley* (Law Rep. 4 Eq. 19), where he considers the distinction between "within" and "under," and that "within" denotes something which is not under, and this distinction seems to me rather to point in the Defendant's favour.

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No doubt the case of *Bell* v. *Wilson* (Law Rep. 1 Ch. 303) (2 seems to import that under the reservation of minerals contained in the deed which was in question in that case the only reservation was of what could be got by mining proper, and Lord Justice *Turner* unquestionably considered that it was necessary, in order to come to the conclusion at which he arrived, to find something in the context in the deed which cut down the words from their original extensive meaning, and

(9 Sc 12/ in H.L. 263

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Mr. *Manisty*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Boger*, for the Appellants:—

A reservation of mines and minerals has commonly been understood as applying only to substances got by mining as distinguished from quarrying or open working. *Darvill* v. *Roper* (1), *Brown* v. *Chadwick* (2), and *Listowel* v. *Gibbings* (3) all support this view. The meaning of the word "mine" is shewn by *Rex* v. *Brettell* (4), *Rex* v. *Dunsford* (5), and *Rex* v. *Inhabitants of Sedgley* (6). But even if the words "mines and minerals" cannot be so far restricted, such a construction must be put on the reservation as will not allow it to be destructive of the grant; and it cannot be held to allow a mode of working which will cause a complete destruction of the

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he found the words "opened and unopened." It would, I confess, have seemed to me doubtful whether these words were quite sufficient to authorize the construction put upon that deed; but, as I said before, however that may be, that was the ground upon which the Lord Justice proceeded.

Here I can find nothing whatever in the deed to affect the ordinary construction of the words "mines and minerals," and therefore if kaolin is to be excluded from the reservation, it must be by the reason of the thing, or, in other words, from a supposed inconsistency between there being any such grant as the deed contains and any such reservation as it purports to contain.

Of course it would not advance the Plaintiff's case to say that either party knew or suspected the existence of such a mineral as kaolin in 1799, nor can the Plaintiffs carry their case to the height of asserting that from the reason of the thing no metal or mineral is to be gotten under the reservation except by mining as distinguished from digging; for not to mention other things, both parties must have had tin in their minds, which appears to be often got by such diggings, or, at least, by operations destructive of the surface, and having nothing in common with mining.

The real difficulty of the case rests in this, that the reservation, if construed according to the full and strict meaning of the words, may be absolutely destructive of the entire grant, and that without compensation. No doubt it is difficult to bring one's mind to accept such a view of the reservation, still the terms must prevail unless they can be limited on one or other of the grounds mentioned above; they cannot be intended to mean nothing, and if they do not mean that which they import the question arises, What is the true meaning? To that question no answer has been suggested which commends itself to my mind. I therefore must hold that the reservation of the mines and minerals is a reservation of this china clay, and must dismiss the bill with costs.

(1) 3 Drew. 294.
(2) 7 Ir. Com. Law Rep. 101.
(3) 9 Ibid. 223.
(4) 3 B. & Ad. 424.
(5) 2 A. & E. 568.
(6) 2 B. & Ad. 65.

surface where there is no provision for compensation. *Bell* v. *Wilson* (1) is decisive on this point, and must be overruled if the decision under appeal is to stand. This is supported by the analogy of the cases in which it has been held that, in the absence of very clear words, working which causes a subsidence of the surface is not authorized, though there be a provision as to compensation for damage done to the surface: *Harris* v. *Ryding* (2); *Humphries* v. *Brogden* (3); *Smart* v. *Morton* (4). In *Duke of Buccleuch* v. *Wakefield* (5), under very special words, it was held that the mine owner might destroy the surface; but that conclusion evidently would not have been come to if, as here, there had been no provision for compensation. The cases of *Hilton* v. *Earl Granville* (6), *Roberts* v. *Haines* (7), and *Blackett* v. *Bradley* (8) shew how strongly the Courts lean against allowing a complete destruction of the surface. *Bullen* v. *Denning* (9), *Midgley* v. *Richardson* (10), and *Hedley* v. *Fenwick* (11) shew the inclination to put a restricted construction on such reservations. The question as to the twenty-seven acres is proper to be tried at law.

[Both parties here concurred in requesting that the Court would decide on the question of title.]

Then we say, on the evidence, that the twenty-seven acres were always part of the *Greys*, but if not, the grant of 1799 must be held to pass them, as the quantity of land thereby expressed to be conveyed cannot be made up without them.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Karslake*, Q.C., and Mr. *Phear*, for the Respondents:—

Upon the evidence, we say that the twenty-seven acres never formed part of *Greys*, but were part of *Garka Moor*, and the right of the lord of the manor to get every kind of mineral substances from under the moor by open workings is not questioned by the bill. The conveyance of 1799 only purports to convey what constituted the copyhold tenement called *Greys*; the acreage

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(1) Law Rep. 1 Ch. 303. 12 Jur. N.S. 263.

(2) 5 M. & W. 60.

(3) 12 Q. B. 739.

(4) 5 E. & B. 30. 1 Jur. N.S. 525

(5) Law Rep. 4 H. L. 377.

(6) 5 Q. B. 701.

(7) 6 E. & B. 643. 2 Jur. N.S. 1050

(8) 1 B. & S. 940. 8 Jur. N.S. 588

(9) 5 B. & C. 842.

(10) 14 M. & W. 595.

(11) 3 H. & C. 349.

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is mere matter of description, and its being too large does not shew an intention to grant more than the copyhold, and if it did the lord of *Treverbyn Courtenay* had only an undivided moiety of *Garka Moor;* so that the Plaintiffs could not have got the entirety of the twenty-seven acres. Our working on the twenty-seven acres, therefore, cannot be restrained, and there has been nothing but an accidental encroachment on the old inclosures, with an express denial of an intention to work there. The allegation, therefore, that we threaten and intend to interfere with any ground on which we have no right to work is not made out, and the Court will not interfere to restrain trespass unless a case of irreparable damage is shewn. The Plaintiffs' case therefore fails: *Gibson* v. *Smith* (1); *Mogg* v. *Mogg* (2); *Mitchell* v. *Dors* (3); *Smith* v. *Collyer* (4); *Courthope* v. *Mapplesden* (5); *Kinder* v. *Jones* (6); *Earl Cowper* v. *Baker* (7); *Thomas* v. *Oakley* (8); *Davenport* v. *Davenport* (9); *Haigh* v. *Jaggar* (10); *London and North-Western Railway Company* v. *Lancashire and Yorkshire Railway Company* (11). But we say that, even under the old inclosures, we are entitled to get the china clay by the usual mode of working. The reservation includes the china clay, which certainly comes within the term "minerals": *Micklethwait* v. *Winter* (12); *Midland Railway Company* v. *Checkley* (13); *Earl Rosse* v. *Wainman* (14). The words "mines and minerals" cannot be cut down unless there is some explanatory context to restrict them. The reservation of minerals includes a right to get them, though to the destruction of the surface: *Rowbotham* v. *Wilson* (15); *Duke of Buccleuch* v. *Wakefield* (16). We therefore must be entitled to get the china clay in the only way in which it can be gotten; and, moreover, express power to dig for it is given. The cases in which it was held that the surface must not be let down were cases where the Court had not before it the instrument under which the mine owner derived title, and do not apply where the instrument gives a right to work. Still less can they apply where the mineral is one which can only be got by destroying the surface. They only shew that workings must not be carried on in such a way as to produce damage which may be avoided. It is clear that this reservation includes tin and the right to get it. But at the time of the grant the usual mode of getting tin was streaming, which is as destructive to the surface as the getting of china clay.

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(1) 2 Atk. 182.
(2) 2 Dick. 670.
(3) 6 Ves. 147.
(4) 8 Ibid. 89.
(5) 10 Ibid. 289.
(6) 17 Ibid. 110.
(7) Ibid. 128.
(8) 18 Ibid. 184.
(9) 7 Hare, 217.
(10) 2 Coll. 231.
(11) Law Rep. 4 Eq. 174.
(12) 6 Ex. 644.
(13) Law Rep. 4 Eq. 19.
(14) 14 M. & W. 859.
(15) 8 H. L. C. 348. 6 Jur [illegible]
(16) Law Rep. 4 H. L. 377.

[They also referred to *Earl Beauchamp* v. *Winn* (1).]

Mr. *Manisty*, in reply, referred to *Dugdale* v. *Robertson* (2) and *Roads* v. *Overseers of Trumpington* (3).

July 22. SIR G. MELLISH, L.J.:—

This is a suit instituted by the owners of a small estate called *Greys*, in the county of *Cornwall*, against the lords of the manors of *Treverbyn Courtenay* and *Treverbyn Trevanion* and their tenants, to restrain them from getting china clay under the property called *Greys*, which is alleged in the bill to consist of old inclosures and of about twenty-seven acres of uninclosed land. The title of the Plaintiffs to the inclosed part is not disputed, but as respects the uninclosed part the Defendants deny the title and also the possession of the Plaintiffs, and say that what is in the bill styled the uninclosed part of *Greys* is in fact part of *Garka Moor*, and that they, as lords of the two manors, are entitled to the soil of that moor. This raises a question of title which ought properly to be tried at law by an action of ejectment; but both parties have requested us to decide the question instead of sending them to law, and therefore before I go into the remaining questions I will deal with that question of title.

[His Lordship then stated the cases made by the Plaintiffs and Defendants as to the uninclosed twenty-seven acres, and the evidence as to the extent of the copyhold tenement, and continued:—]

(1) Law Rep. 4 Ch. 562.

(2) 3 K. & J. 695.

(3) Law Rep. 6 Q. B. 56.

We have to decide as a question of fact what is the result of that evidence. In the first place, nobody can doubt that before the manors were separated *Garka Moor* was a waste common, the freehold of which was in the lord of the manor of *Trevanion*, the copyholders having only certain rights over it. That being so, whenever the manor was divided into two it is difficult to say that what was freehold and not copyhold could by any legal means become annexed to the copyhold estate called *Greys*, so as to become part of it, and whether it could be so annexed except by Act of Parliament is doubtful. It appears to us, judging as a jury would upon the question of fact, that the proper way to reconcile the whole of the evidence is to presume that at some time, possibly at the very time when the manors were separated, the tenants who had a right of common over the *Garka Moor* common being but few, an arrangement was come to between them, possibly with the consent of the lord, that each of them should enjoy a separate common right to take the pasture and turf off a particular portion of the common instead of their equally enjoying it together.

If we suppose that to have taken place, Mr. *Spry*, who made for the duchy the old map and terrier which have been produced, finding that state of things, might naturally come to the erroneous conclusion that a certain portion of the waste was part of the copyhold called *Greys*, and lay it down in his map as being so. All the evidence will thus be accounted for. The result is that this piece of moor was part of the moor which the two lords held as tenants in common in moieties, and was not part of the copyhold estate called *Greys*. Then it was argued on behalf of the Plaintiffs that because the parcels of the deed of 1799 include a parcel of land running with *Garka Moor* containing twenty-seven acres, and these twenty-seven acres cannot be found in the inclosed part of *Greys*, therefore twenty-seven acres (although how we are to get the bounds I do not know) are to be taken out of the moor. That I think is not the true construction of the deed. The deed professes to convey "all that customary or copyhold tenement called *Greys*," and the rest is simply a description of what is contained in *Greys*, and it is said besides, "which said tenement called *Greys* is now held for the life of *John Hext*, gentleman, under the yearly rent of 15*s.* 3*d.* by copy of Court roll." It appears to me that nothing

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but what was part of the customary or copyhold tenement called *Greys* could pass under that, notwithstanding there might be any misdescription in the parcels. If the tenement called *Greys* was entitled to an exclusive right of common over a portion of the moor which by mistake had been treated as if it were parcel of the copyhold tenement, the consequence would be that the exclusive right of common would pass, but the property in the soil would not pass. Therefore, upon the whole, I come to the conclusion that the Plaintiffs have not made out their title to what they call, as I think erroneously, the uninclosed part of *Greys*, and therefore cannot have any relief respecting it, the bill not being framed for raising the question whether the getting china clay can be complained of by persons only entitled to rights of common over the land.

Then I come to the question whether the Plaintiffs are entitled to relief respecting the inclosed part of *Greys*. Mr. *Karslake* raised the objection that the Defendants have not threatened to get, and have not—except by mere accident—got any china clay in *Greys;* and therefore that this Court ought not to grant an injunction, or enter into the question whether they are entitled to get it or not.

The facts upon this part of the case are these: It appears that the first two Defendants, as lords of the manor, have let to the two other Defendants the right to get china clay in the waste and over a large portion of the estate called *Greys*, and therefore they profess to exercise the right of ownership over it, and they have professed to give them the power to get china clay from *Greys* in the ordinary way in which china clay is got in that neighbourhood. It appears that the lessees have entered on one occasion into the estate called *Greys* with the intention of getting china clay, though they did not get any, and did not remain there. The bill being filed and the question raised, the Defendants being sought to be restrained from getting china clay, they say, "We have a title to get china clay out of the estate called *Greys*, and we are entitled to get it in the way in which it is ordinarily got; but we have no present intention of getting it." We are of opinion that after this it is idle for the Defendants to say they do not threaten to get the china clay under the inclosed part of *Greys*, and to contend that

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this Court is precluded from deciding the question whether they are entitled to get it in the way in which they say they have a right to get it.

That brings us to the real question on the merits, whether the Defendants, having had the manor of *Treverbyn Courtenay* conveyed to them, have a right to get the china clay under the reservation and exception in the deed of 1799.

The first question to be determined is whether the china clay is within the exception of "mines and minerals." Now china clay is thus described :—[His Lordship here read the account of china clay, and the mode of getting it, from the Plaintiffs' evidence, as above.]

21 Ch D 33-5
22 Ch D 42.
8 App Cas 508

Is this china clay reserved under the exception of "mines and minerals?" There was a great deal of discussion before us as to the meaning of the word "mines," whether it is confined to underground working, or may possibly extend to open working, or whether it does not apply to the workings at all, but in this sort of reservation means the metal, the veins, and seams themselves, which are in a secondary sense called "mines." I think that it is not necessary here to go into those questions, for whatever may be the meaning of the word "mines" when used alone, it is here combined with the more general word "minerals," and the authorities seem to shew that where there is an exception of "mines and minerals," the putting the word "mines" before "minerals" does not restrict the meaning of the word "minerals." Many authorities, some at law and some in equity, have been brought before us to shew what is the meaning of the word "minerals." But the result of the authorities, without going through them, appears to be this: that a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning. Ought it to have a more limited meaning in the present case? The circumstances, as far as they are material to be stated, are these: The seller was the lord of the manor. What he sold was the freehold of a copyhold tenement. Now the lord of a manor is, beyond all question, entitled to all the minerals, in the most general sense of the word.

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5 Ch D 762

under a copyhold tenement. There is nothing to be got out of the soil and sold for a profit which the copyhold tenant, in the absence of some special custom, is entitled to get without the permission of the lord; the property of it is in the lord, although it is true that, in the absence of special custom, the lord cannot get it without the license of the tenant. The position of the parties, therefore, furnishes no reason for restricting the meaning of the word "minerals," and there being no special words before "mines and minerals" which might furnish an argument for restricting them to things *ejusdem generis*, I am of opinion that the surface, and all profit that can be got from cultivating the surface, or building on it, or using the surface, is intended to be conveyed, but that the right to everything under the surface, and to all profit that can be got from digging anything out from under it, is intended to be reserved. I am therefore of opinion that china clay is included in the reservation. The only argument against this is that china clay cannot be got without destroying the surface, and that it could not be intended to give power wholly to destroy the surface without compensation. The case of *Bell* v. *Wilson* (1) appears, however, to be a direct authority that the mere circumstance that a mineral cannot be got without destroying the surface, though it may be a very strong ground for holding that the owner of the mineral is not entitled to get it, is not a ground for straining the meaning of the word "mineral." In that respect the Lords Justices differed from Vice-Chancellor *Kindersley*, and we are bound by their decision.

Then we come to the important question, whether there is power to get this china clay in the only way in which, according to the concurrent testimony of all the witnesses, it can be got, by a process which utterly destroys the surface of the land. A great number of cases were cited to us upon that point, in none of which was the language exactly similar to that in the case before us, and they must be referred to merely for the purpose of getting a principle from them. Now the cases shew that where the ownership of minerals is separate from the ownership of the surface, *primâ facie* the owner of the surface is entitled to have his surface supported by the minerals. That is not confined, as contended by the

(1) Law Rep. 1 Ch. 303. 12 Jur n 263,

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Solicitor-General, to the case where the Court has not before it the instrument under which the owner of the minerals derives his rights, but it also applies to cases where the Court has the instrument before it, for the purpose of construing the instrument, to this extent, that *primâ facie* the right to support exists, and the burden lies on the owner of the minerals to shew that the instrument gives him authority to destroy what is described by the Judges as the inherent right of a person who owns the surface apart from the minerals. The question is, whether the words of the reservation in the present case mean that the ownership of the surface is altogether to be subject to the ownership of the minerals, so that the owner of the minerals may do whatever is necessary for the purpose of enabling him to get them, although it may of necessity utterly destroy the surface; or do the words, according to their true construction, only give a right, in the nature of an easement, to go upon the surface and dig through it for the purpose of getting at the minerals underneath? In my opinion, the short and ambiguous words of this reservation, according to their fair construction, only give a right to create what I may call temporary damage, and do not authorize the owner of the minerals absolutely to destroy or to cause a serious continuous and permanent injury to the surface.

Now if we refer to the authorities we find that there are several cases relating to the right of the owner of minerals to let down the surface in the course of getting the minerals by pure mining—cases in which the power of getting the minerals has been given in far stronger language than it is in the present case, where, nevertheless, the Courts held that he was not entitled to get the whole of the minerals if that involved the destruction of the surface, but that in getting them he must have regard to the rights of the owner of the surface to support by the minerals. In *Harris* v. *Ryding* (1) the power was this: "With full liberty of ingress, egress, and regress to come into and upon the thereby appointed and granted and released premises to dig, &c., the said mines, &c., and every part thereof, and to sell and dispose of, take and carry away, whatever might be there found at their or his respective wills and pleasures; and also to sink shafts, &c., for the raising up, working, carrying away, and disposing of the same or any part

(1) 5 M. & W. 60.

thereof, making a fair compensation to *T. P.* (the grantee) for the damage to be done to the surface of the said premises and the pasture and crops growing thereon." In *Roberts* v. *Haines* (1) the owner of the minerals was expressly authorized "to search for, dig, get, and raise any coal and ironstone lying and being in or under the commons and waste lands, and to erect any work or works for that purpose, and to dig and take earth for making and to make bricks for any such work or works; and to carry away and dispose of such coal and ironstone to and for his and their own use." In *Smart* v. *Morton* (2) the words were: "With free leave and liberty to sink, work, and win the same in any part of the said premises, and to drive drift or drifts, make watergate or watergates, or use any other way or ways for the better and more commodious working and winning the same in the said hereby granted or intended to be granted premises, or any part thereof." In *Bell* v. *Wilson* (3), which is a most important authority, since it related not merely to the letting down of the surface by working underground, but to the working from above, the words of the reservation are such that the case appears to me almost decisive of the present. I believe it will be found that every single word contained in the present power is contained in the power in *Bell* v. *Wilson*, along with many other words; yet under that reservation, worded in a way more favourable to the owner of the minerals than that with which we have to deal, the Lords Justices held that although stone was reserved as a mineral, yet there was no right to get it by quarrying.

There are, however, two cases which ought to be referred to, in which the House of Lords held an owner of minerals entitled to let down the surface or absolutely to destroy the surface for the purpose of getting the minerals. The first of those cases is the case of *Rowbotham* v. *Wilson* (4). In that case there was a covenant which the House of Lords construed to be a grant that the mines should be held and enjoyed, worked and gotten, "without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them respectively, who for the time being are or may be

(1) 6 E. & B. 643. 2 Jur. N. S. 1000
(2) 5 Ibid. 30. 1 Jur. N. S. 825
(3) Law Rep. 1 Ch. 303. 12 Jur. N. S. 263
(4) 8 H. L. C. 348. 6 Jur. N. S. 965

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owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows or being otherwise defaced and injured where such mines shall be worked." The instrument, therefore, said in terms that the surface might be let down, and no doubt the House of Lords decided contrary to what was said in the judgment in *Hilton* v. *Earl Granville* (1), that such a grant, where it is clearly expressed, is not void. Again, in the case of the *Duke of Buccleuch* v. *Wakefield* (2), the House of Lords held that power was given absolutely to destroy the surface. That is the only case which resembles the present, in this, that it related to a peculiar kind of mineral which could not be got at all without destroying the surface. But if that case is looked into it will be found to differ from the present in three most material respects. In the first place, the iron ore, which was the mineral then in question, had been got in very large quantities by the lord of the manor before the Act of Parliament for inclosing the waste was passed. It was a most valuable mineral, so that it was impossible to suppose it not to have been in the contemplation of the parties at the time they obtained their Act, and it was proved that the lord of the manor had constantly let similar iron mines in the manor, paying compensation for the damage which was done. In the next place, without stopping to read the whole of the reservation in that case, it will be found that it contains far more extensive words than the reservation in the present case. It contained powers which, as is pointed out in the judgments, clearly enabled in certain events the surface to be destroyed. There was an unlimited power to deposit the refuse of the minerals on the surface, and there was unlimited power of erecting buildings upon the surface, and there were at the end most general words enabling every power to be exercised which was necessary to get the minerals. In the last place, there was a clause which enabled full compensation to be given for any damage that might be done. Taking the whole of these circumstances into consideration, the House of

(1) 5 Q. B. 701.

(2) Law Rep. 4 H. L. 377.

Lords, reversing the decision of Vice-Chancellor *Malins*, came to the conclusion that, according to the true meaning of the Act, the lord of the manor was to be entitled, if he found it necessary for the purpose of getting what was known to all parties to be a most valuable mineral, to destroy the surface on making compensation; or, in substance, that, for the purpose of getting the minerals, he should have power to buy the surface back, paying the full value for it. I think that no one can read the judgment without coming to the conclusion that if the provision as to compensation had not been there the House of Lords, notwithstanding the strength of the other words, would in all probability have come to a different conclusion. In the present case there is no reason to suppose that the parties had china clay in contemplation at the time when the deed was executed. There is, indeed, one old man who proves, and I do not dispute the correctness of what he says, that china clay was at the time being got in one neighbouring parish, but it is proved that it was not got in the parish in question for a great many years afterwards. And it is also proved that it was not until years after this that the Duchy of *Cornwall* received any dues for getting china clay. Upon the whole, therefore, I come to the conclusion that the words here used are not sufficiently clear to give the owner of the mines the absolute power of destroying the surface, and that the Defendants have not the right they claim.

There is one argument that I should, perhaps, notice. It was urged that streaming for tin had been used in *Cornwall* from time immemorial; that therefore it was impossible to suppose that the right of streaming for tin was not intended to be reserved; and that, as streaming for tin involved an injury to the surface of the same kind, if not quite to the same extent, as the taking of china clay, the fact that taking the china clay involved the destruction of the surface was no sufficient reason for holding the right to take it not to be reserved. I do not wish to give any decisive opinion whether the right of streaming for tin is reserved or not, as that question is not before us, and may be of very great importance. That question does not stand quite on the same footing as the question relating to the taking of china clay. There is no doubt that streaming for tin was a thoroughly well-known and common process. At the same time, tin might be got by mining, and the

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owner of the minerals would not, by being precluded from streaming, be deprived of all power to get it, and, as at present advised, I do not think that the words of the power in the present case are sufficient to confer a right of streaming for tin. When an owner of both surface and minerals sells the surface and reserves the minerals, with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the Court may be able to say that such was clearly the intention of the parties. The Vice-Chancellor in his judgment fully acknowledged the difficulty that, if the Defendants had the right to take china clay, the reservation might be absolutely destructive of the grant, but said he could not see where he was to fix the limit to the reservation if its words were not to be taken according to their full and strict meaning. I feel myself that it is very difficult to say where the limit is to be placed. It is very difficult to lay down exactly what the owner of minerals may do for the purpose of getting them; but I do not think it would be right or just to the owner of the surface to say that his surface may be destroyed because there may be a difficulty in saying exactly what the owner of minerals may do and what he may not do in every case. In the present case I think the result is this, that the general reservation of minerals includes the china clay, a mineral the existence of which apparently was not known to the parties at the time when the instrument was executed, and which cannot be got without destroying the surface. It appears to me that the fair result of that state of things is that the lord of the manor is practically in the same position as he would have been in if this had remained a copyhold tenement, viz., that the right to the clay is in him; but inasmuch as he has not reserved the power to destroy the surface, and inasmuch as this clay cannot be got without destroying the surface, he cannot get the clay unless he can make some arrangement with the owner of the surface. I am, therefore, of opinion that the Plaintiffs are entitled to have an injunction to restrain the Defendants from getting the china clay in such a way as to destroy or seriously injure the surface; but as they have failed in one most essential part of the case—namely, the part relating to the twenty-seven acres—they ought to have no costs.

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Sir W. M. James, L.J.:—

I entirely concur both with the conclusions and reasoning of the Lord Justice. The long and uniform series of authorities appear to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner's practical enjoyment of his houses, gardens, fields, and woods, without which the grant to him would have been illusory.

But for these authorities I should have thought that what was meant by "mines and minerals" in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century; upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral.

Solicitors: Messrs. *Bell, Brodrick, & Gray*; Mr. *T. Gill.*

BUDGE *v.* GUMMOW.

[1864 B. 154.]

Trustees—Improper Investment—Insufficient Value.

L. JJ.
1872
July 20, 22.

8 Ch D 490
23 Ch D 491
492

Trustees were charged with the loss occasioned by an investment of the trust funds on insufficient security. The property was a hotel in the country, and the trustees had sent down a *London* surveyor who valued the hotel, including therein the licence, at nearly double the sum to be advanced. The hotel turned out to be worth much less than the sum advanced. The trustees gave no further account of the circumstances under which the advance was made:—

Held (reversing the decision of *Bacon*, V.C.), that the trustees were chargeable with the sum so advanced.

The trustees in this case held funds under the marriage settlement and under the will of *Michael Gummow*. Under each instrument the trustees had power to invest in Government or real securities. The settlement contained the usual trustees' indemnity clause; and the will contained a declaration that the trustees were not to be answerable for involuntary losses. The trustees had, out of the blended funds so held, advanced £1400 on mortgage of a

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freehold hotel at *Broadstairs*, upon which a heavy loss had been incurred.

The only evidence as to how the advance had been made was on an affidavit of the trustees. By that affidavit it appeared that before the advance was made, Mr. *Harbin*, a solicitor and the acting trustee, had employed a competent *London* surveyor to go to *Broadstairs* and value the property on which the advance was to be made. The property was a freehold hotel lately built, and called the *Balmoral Hotel*, then let for £120 per annum. The surveyor made his report, in which he valued the property at £2700, but that valuation included the sum of £800 at which he valued the licence. The trustees thereupon, in April, 1855, advanced the £1400 to the owner of the fee in the hotel, and took a mortgage in fee for that amount. The then tenant of the hotel soon afterwards failed, as did a subsequent tenant, and the hotel was shut up until 1860, when it was let for £50 a year. The mortgagor had not paid the interest, and the trustees had advanced sums for repairs, and in other ways, so that, with the arrears of interest, there was a total loss to the estates of £2114.

The trustees, in 1864, instituted a suit for the administration of the two estates. A decree was made and accounts were directed. The trustees made an affidavit as above mentioned, and the *cestuis que trust* produced evidence by surveyors that the property was worth between £800 and £900. The Chief Clerk disallowed to the trustees the sum of £1400 so advanced.

The trustees then took out, before the Vice-Chancellor *Bacon*, a summons to vary the certificate of the Chief Clerk, and the Vice-Chancellor *Bacon* directed the certificate to be varied accordingly (1).

(1) 1872. March 22. WN(72)79

SIR JAMES BACON, V.C.:—

There is no doubt that a trustee who deals with trust property as carefully as if it were his own property commits no breach of trust. Now in this case the trustees employed a competent person to go to *Broadstairs* and examine the property. He found it occupied by a respectable tenant as a hotel, and held at a sufficient rent. No doubt, in estimating the value of the property, the surveyor took into consideration the value of the public-house licence, and it was contended that this ought not to have been done. It is true that a public-house licence is a merely personal thing, but still a licensed public-house has a particular value of its own; and even if the tenant had to be turned out, the owner could have obtained another tenant and another licence, and

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The *cestuis que trust* appealed.

Mr. *Eddis*, Q.C., and Mr. *Waller*, for the Appellants, cited *Stretton* v. *Ashmall* (1); *Jones* v. *Lewis* (2).

Mr. *Kay*, Q.C., and Mr. *Speed*, for the trustees:—

The trustees acted with as much care as if they had been advancing their own money. What could they do more than take the opinion of a competent surveyor? It had been suggested that they ought to have employed a local surveyor who would have known more about it. But the practice is quite the other way, and *London* surveyors in whom the lenders have confidence are very generally employed. Certainly the investment has turned out unfortunately, but we must not look at it as it appears now, but as it appeared in 1855.

[The LORD JUSTICE JAMES:—I never before knew a case of this kind in which the trustees have not shewn how they were induced to lend the money.]

The trustees have made an affidavit which they conceived to be quite sufficient. There is no case of fraud or *mala fides* alleged or suggested against them; at all events there are no materials now before the Court to enable the Court to say that the trustees acted improperly.

SIR W. M. JAMES, L.J.:—

In this case I am compelled to decide against the trustees, however painful it may be. In my opinion it would be *pessimi exempli*

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so the value of the house would have remained unimpaired. Then, after the lapse of fourteen or fifteen years, certain surveyors and valuers are brought forward to say that in 1855 the house was not worth £900. But no sufficient case has been made for charging with the loss the trustees, who had employed a competent person to value the property before they advanced the money. Although the investment, from subsequent events which could not have been foreseen, had resulted in a heavy loss, there had been no breach of trust, and the amount must be allowed to the trustees. As to the sums paid for repairs and the other expenses, I have no sufficient evidence, and there must be a further inquiry respecting them.

(1) 3 Drew. 9.

(2) 3 De G. & Sm. 471.

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if it should go forth to the world that trustees might lend trust money under such circumstances as these before us.

We know that £1400 was lent upon property which will not now produce more than £50 a year, and persons really acquainted with it say that it was not worth more than £800 or £900. The trustees have contented themselves with producing the report of the surveyor employed by them.

[His Lordship then read the report.]

It appears to me that that report is one upon which no sensible or prudent man would ever lend such a sum as £1400. The value of the hotel licence was thrown in, but how could a land surveyor, who was a stranger to the place, estimate the value of the licence? The trustees ought to have ascertained, as they might easily have done, that the hotel was but recently opened and that the licence could have no such value. The value of a hotel is necessarily of a very speculative character, and may, like the property in the case of *Stickney* v. *Sewell* (1), arise from accident.

Mr. *Harbin*, one of the trustees, must have known that it could not be worth even £1900, and I suspect that the £800 was thrown in to make up a sufficient value.

It was a security which trustees were not justified in taking, and they have not chosen to give any explanation of how they were induced to make the investment, or how they came to employ a surveyor who was not acquainted with *Broadstairs*. Nor does it appear that there was actual evidence given as to the existence of the lease for £120.

Upon the whole, it appears to me that the Chief Clerk, who necessarily has had much experience in these matters, has come to a correct conclusion, and that the decision of the Vice-Chancellor must be reversed. The Appellants will have their costs below, but not of the appeal.

SIR G. MELLISH, L.J., concurred.

Solicitor for the Appellants: Mr. *G. Cordwell.*
Solicitor for the Trustees: Mr. *W. F. Low.*

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(1) 1 My & Cr. 8.

In re HATTON.

L. JJ.
1872
July 25.

Composition—Default in payment of Instalment—Action—Injunction.

Where, by resolutions under the *Bankruptcy Act,* 1869, the creditors agreed to accept a composition payable by instalments, and the debtor made default in payment of an instalment to a creditor:—

Held (reversing the decision of the Registrar), that the creditor could maintain an action against the debtor for the balance of the whole debt remaining unpaid, and would not be restrained by the Court of Bankruptcy.

8 QB 182-3-4
8 Ex 187, 190
192, 4, -5
8 Ch 598
— 684-5, 8
— 744
17 Eq 123, 5
— 336 - 337
9 CP 99, 101
18 Eq 252
1 Ch D. 289
1 CPD 114
1 Ch D. 543
2 CPD. 285
7 Ch D. 117
16 Ch D 677
18 Ch D 465
23 Ch D 708

GEORGE HATTON, on the 24th of March, 1871, filed his Petition for liquidation or composition with his creditors, and at the first meeting of creditors the following resolutions were passed:—"1. That a composition of 5*s.* in the pound shall be accepted in satisfaction of the debts due to the creditors from the said *George Hatton:* 2. That such composition be payable as follows: 2*s.* 6*d.* in the pound three months after registration of this resolution, and 2*s.* 6*d.* in the pound six months after registration;" which resolutions were duly confirmed and registered.

Messrs. *Hodge & Co.*, as creditors of *Hatton,* assented to the resolutions, and received the first instalment of £5 18*s.* 9*d.* on their debt of £47 10*s.*

The second instalment became due on the 26th of October, 1871, but was not paid, and *Hatton* now alleged that he was unable to pay it. *Hodge & Co.* applied for payment, and on the 30th of April, 1872, commenced an action in the Court of Common Pleas to recover a balance of £45 8*s.*

Hatton then sent them an order for £5 18*s.* 9*d.* as the second instalment, which they refused to receive.

Hatton then obtained from the Registrar acting as Chief Judge in Bankruptcy an injunction restraining *Hodge & Co.* from proceeding with their action until the further order of the Court.

Hodge & Co. now moved, by way of appeal, to discharge the order granting the injunction.

Mr. *De Gex,* Q.C., and Mr. *Bagley,* for the Appellants:—

Unless the terms of the composition are observed, the creditor is restored to his full rights: *Sewell* v. *Musson* (1); *Edwards* v. *Coombe* (2).

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(1) 1 Vern. 210.

(2) Law Rep. 7 C. P. 519.

Mr. *Robertson Griffiths*, for *Hatton* :—

The creditor ought to proceed in bankruptcy to enforce his rights, whatever they may be, and ought not to harass the debtor and obtain payment in full, to the disadvantage of the other creditors. Sect. 126 of the Act of 1869 shews how the creditor ought to proceed. One object of the Act was to prevent proceedings in any other Court when once the affairs of the debtor were before the Court of Bankruptcy. *In re Hemingway* (1) is a direct authority

8 QB 183a(4)
8 Ch 596
5 Ch D. 68

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(1) 1872. March 25. C. J. B.

Ex parte HEMINGWAY.

THIS was an appeal from an order of the Registrar of the County Court at *Leeds* restraining the Appellant, *Hemingway*, from issuing execution on a judgment obtained by him under the following circumstances :—

On the 12th of April, 1871, one *Howard* filed a petition under the arrangement clauses of the *Bankruptcy Act*, 1869. The first meeting of the creditors was duly held, and a resolution was passed accepting a composition of 5*s.* in the pound, payable one month after registration. On the 19th of May the second meeting of the creditors was held, at which this resolution was confirmed, and it was registered on the following day. At the first meeting *Hemingway* attended by proxy, and tendered a proof for £15 12*s.* debt, and £1 16*s.* 6*d.* costs. The debt was admitted, but the costs were objected to. He also attended the second meeting. No tender of the composition was ever actually made to *Hemingway*, but on or about the 20th of June a circular letter was sent to the unpaid creditors, giving notice that the composition was payable at the office of *Howard's* solicitor, but that if required it would be forwarded by Post-office order. The Appellant alone of the then unpaid creditors denied having received such circular letter, and on the 5th of December he entered a plaint in the County Court at *Leeds* for the amount of the debt admitted by the bankrupt. The County Court Judge gave a verdict for the Plaintiff for the full amount, but intimated that the Defendant might apply, under the *Bankruptcy Act*, 1869, for an injunction to restrain the Plaintiff from recovering under his judgment more than the composition and the costs of the action. The Court, on an application being made, granted the injunction, and made the order now appealed from.

Mr. *Bagley*, in support of the appeal.

Mr. *Robertson Griffiths*, *contrà*.

The CHIEF JUDGE was of opinion that the resolution, having been duly passed at meetings which the Appellant by his solicitor attended, could not now be called in question, but was binding on all the creditors equally.

As to a tender of the composition not having been actually made, that, under the circumstances, was impracticable, unless the debtor chose to tender more than he admitted to be due, as the amount of the debt was disputed. His Honour thought that the creditor ought to have used the remedies given to him by the Act of 1869, and to have proceeded in the Court of Bankruptcy to recover the composition, and that he had no right to sue at common law for his debt. The appeal must be dismissed with costs.

on the point. The original debt is gone by the composition, and the creditor can now only proceed in bankruptcy.

SIR W. M. JAMES, L.J.:—

I think that we are bound by the decision of the Court of Common Pleas in *Edwards* v. *Coombe* (1).

We find, indeed, a decision in *In re Hemingway* which appears to be conflicting with that decision, but there were peculiar circumstances in that case which may have had some influence upon the mind of the Chief Judge. Here, however, the question has resolved itself into the simplest form possible. If the debt continues to exist at common law, and it has been decided that the debt does continue so to exist, there is nothing in this case to induce us, as a Court of Equity, or a Court of Bankruptcy, to say that the debt does not exist in this Court.

The Act has provided that a certain majority of the creditors shall have power to bind every creditor to accept a composition, or something less than he is entitled to. In this case the creditor is to accept 5*s*. in the pound, payable by instalments, at three months and six months. It must be conceded that if this had been an agreement with any individual creditor, that agreement could not be pleaded as accord and satisfaction of the debt unless actual payment of the 5*s*. *modo et formâ* could also be pleaded; and I do not see why we are to suppose any difference between the two cases. It is true that the Act has given not only power to make binding resolutions as to the composition, but power to the creditors to enforce in bankruptcy payment of the composition. That, however, amounts only to a further security, and does not alter the nature of the agreement. If the creditors had intended to make such an alteration, they might have said so. The resolution of the creditors might have provided that giving promissory notes, with or without sureties, should be accepted in discharge of the existing debts, and then the execution of the promissory notes by the debtor and the sureties might be pleaded as accord and satisfaction.

To give any other interpretation to the Act would be to interfere with the general provisions of the Act, and would in fact interfere with the rateable distribution of the assets, instead of having the contrary effect, as had been argued. It was said that the debtor might then be able to pay half his creditors, and leave the others unpaid, but that is entirely met by the provision at the end of the 126th section, enabling the Court under such circumstances to adjudge the debtor a bankrupt. If the debtor applies great part of his assets in payment of some of his debts, any other creditor, seeing that the debtor would then not be able to pay him, can go to the Court of Bankruptcy and have the debtor adjudged bankrupt, so as to prevent that state of things.

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(1) Law Rep. 7 C. P. 519.

It appears to me that the Court of Common Pleas has decided in accordance with my own view, that the composition must be paid pursuant to the agreement as well as agreed to be paid to give the debtor a valid defence to an action at law; nor is there any defence or any equity in this Court. There may be cases in which by accident, and not by default of the debtor, the composition is not duly paid, and then no doubt this Court would relieve the debtor from the effect of such an accident, and remove any injustice.

SIR G. MELLISH, L.J.:—

1 Ch D. 115. I am of the same opinion. At common law, where a body of creditors accept a composition, they may either agree to take the promises of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him. There is nothing in the Act to alter this state of things. There may be, as in this case, a simple composition which the creditors agree to accept if paid to the day, and there is in my opinion no reason why we should construe these resolutions otherwise.

1 Ch D 118
7 Ch D. 417
16 Ch D 677

In a similar case, as I understand it, the Court of Common

Pleas has held that the creditor could maintain his action for the full amount, and there is nothing to induce us in this case to restrain him. The only excuse given by the debtor is that he had not money with which to pay this instalment; but that, under the circumstances, is not a sufficient excuse; and it was not until the action was brought that the composition was tendered.

The order of the Registrar must be discharged. The creditors will have their costs below, but not of the appeal.

Solicitor for the Debtor: Mr. *J. T. Moss.*

Solicitor for the Creditors: Mr. *G. D. Webb.*

In re WARD'S TRUSTS.

L. JJ.
1872
July 27.

Failure of Purpose of Gift—Settlement—Advancement—Abolition of Purchase of Commissions in Army—Regulation of Forces Act, 1871 (34 & 35 *Vict.* c. 86).

By a separation deed a sum of money was directed to be held by trustees upon trust for the wife for life, and after her death, as to four-sixth parts thereof, for *F. W.*, one of the children of the marriage, who was then an officer in the army, during his life, and after his death for his children. And it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding £2000, in or towards effecting the promotion of *F. W.* in the army. The trustees applied £850 in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army, under the Royal Warrant of the 20th of July, 1871, no further sum could be applied for the same purpose:—

Held, that the purpose for which the power was given to the trustees having failed, the residue of the sum of £2000 could not be raised and applied in any manner for the benefit of *F. W.*

Palmer v. *Flower* (1) distinguished.

THIS Petition was heard in the first instance by the Lords Justices at the request of the Master of the Rolls.

On the 24th of March, 1869, a deed of separation was executed by Mr. *Frederick Ward* the elder and *Jane* his wife. By this deed, after reciting, among other things, that Mr. and Mrs. *Ward* had five children, of whom *Frederick Ward* the younger was one, it was declared that the two trustees of the indenture should stand

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(1) Law Rep. 13 Eq. 250.

L. JJ.
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possessed of a sum of £10,969, which had been paid to them, upon trust to invest the same and to pay the income thereof to Mrs. *Ward* during her life for her separate use, and after her death, as to four-sixths of the trust fund, upon trust to pay the income to *Frederick Ward* the younger for his life, and after his death upon trust for the children of *Frederick Ward* the younger as he should by deed or will appoint, and in default of appointment upon trust for the children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares; and in default of children, for his sisters *Caroline Nott* and *Frances Ward* and their respective children as therein mentioned. And the indenture contained a proviso that it should be lawful for the trustees or trustee for the time being, if he or they should in their or his discretion see fit (and they or he should be under no fiduciary obligation as to the exercise of such discretion), at any time or times while the said *Frederick Ward* the younger should continue to hold a commission in Her Majesty's army, by and out of the said four-sixth parts, to raise any sum or sums not exceeding in the whole the sum of £2000, and to apply such sum or sums in or towards the purchase of or effecting his promotion in Her Majesty's army; but it was provided that no sum should, during the life of Mrs. *Ward*, be raised for that purpose without her consent in writing, and that in that case *Frederick Ward* the younger should by his bond secure her an annual sum during her life equal to £5 per cent. on the sum so raised.

In July, 1869, the trustees applied £850, part of the sum of £10,969, with the consent of Mrs. *Ward*, in effecting the promotion of *Frederick Ward* the younger to the rank of lieutenant in the army, and he executed a bond as required by the separation deed.

By a royal warrant of the 20th of July, 1871, and by the *Regulation of the Forces Act*, 1871 (34 & 35 Vict. c. 86), the purchase of commissions in the army was abolished, and it therefore became impossible to apply any further portion of the sum of £2000 in that way.

The trustees accordingly presented a petition, under the 22 & 23 Vict. c. 35, asking for the advice and direction of the Court whether they might safely pay the sum of £1150, being the balance of the sum of £2000, to *Frederick Ward* the younger, or whether they might exercise the power of advancement in any other way for his benefit.

The Petition was presented in the Court of the Master of the Rolls, but, at his request, was heard by the Lords Justices.

All the members of the family who were adult consented to the application.

Mr. *Waller*, for the Petitioners, referred to *Palmer* v. *Flower* (1), where Vice-Chancellor *Bacon* directed a sum of £6500, which trustees were empowered by a testator to raise for procuring the promotion of his nephew in the army, to be paid to him absolutely, under similar circumstances to those under which the present difficulty had arisen. The only distinction between that case and the present was that this case arose on a deed *inter vivos* instead of a will. But as it was a settlement for the benefit of the family, and *F. Ward* the younger was one of the objects of the settlor's bounty, for whom a provision was intended, the same principle would apply. It was a circumstance to be considered that he was in the army at the time when the deed was executed; if he had not been the provision for his advancement would probably have been more general. He also referred to *Leche* v. *Lord Kilmorey* (2), *Barlow* v. *Grant* (3), and *Cope* v. *Wilmot* (4).

Mr. *S. Dickinson*, for Mr. *F. Ward* the younger and his mother and sisters.

Mr. *Streeten*, for Mr. *F. Ward* the elder.

Mr. *Bunting*, for the infant children of *Caroline Nott*, offered no opposition.

SIR W. M. JAMES, L.J.:—

This is not an absolute gift, it is only a discretionary power to advance money for the benefit of the son in one particular direction. I think the case is not governed by *Palmer* v. *Flower*. That was a case of a will, and the Vice-Chancellor proceeded on the expressed intention of "making a provision for the advancement" of his nephew. Here there is a deed between parties, and we must

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(1) Law Rep. 13 Eq. 250.

(2) T. & R. 207.

(3) 1 Vern. 255.

(4) 1 Coll. 396, n.

L. JJ.
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In re WARD'S TRUSTS.

be guided by the express words. If the way of applying the money, which was legal at the date of the deed, had continued to be legal, it might have been applied in that way. As the law now stands Mr. *Ward* gets his promotion without the payment of money, and the fund cannot be so applied.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Newbon & Co.*; Mr. *J. J. Darley.*

L.
1872
July 30.

Ex parte KIVETON COAL COMPANY.

In re PHILLIPS.

Bankruptcy—Practice—Appeal from part of an Order—Liberty to appeal after twenty-one days—Bankruptcy Rules, 1870, *rule* 143.

14 ChD 352

When an appeal is brought from part of an order in bankruptcy the whole case is not open to the Respondent; but if he wishes to complain of another part of the order he must present a cross-appeal.

Where the Appellant had not given notice of appeal until the last day allowed for the purpose, the Court gave the Respondent leave to present a cross-appeal, though the time for appealing had expired.

THIS was an appeal by the *Kiveton Coal Company* from part of an order of Mr. Registrar *Hazlitt* sitting for the Chief Judge.

On the 6th of September, 1871, *Phillips* presented a petition for liquidation of his affairs by arrangement. On the 28th of May, 1872, the trustees under the liquidation gave notice of motion to set aside, as fraudulent and void, a sale made by *Phillips* on the 24th of August, 1871, of twenty-seven coal waggons to the *Kiveton Coal Company.* On the 26th of June, 1872, Mr. Registrar *Hazlitt* made an order declaring that the sale of the waggons was not fraudulent and void, but that the company had become the true owners of the same; but the order went on to declare that such of the waggons as had not been taken possession of by the company before the commencement of the liquidation were, at the date of such commencement, in the possession, order, or disposition of *Phillips*, by the consent and permission of the company the true owners thereof; and to direct that the same should therefore be delivered up to the trustees.

On the 17th of July the company gave the trustees notice of appeal from so much of the order as directed the waggons which had not been taken possession of by the company before the commencement of the liquidation to be delivered up to the trustees.

Mr. *Roxburgh*, Q.C., for the Appellants.

The Hon. *A. Thesiger* (Mr. *J. Linklater* with him), for the trustees, claimed to open the whole case, and to have the sale altogether set aside. He cited *Sherwin* v. *Shakspear* (1) ; *Watts* v. *Symes* (2).

THEIR LORDSHIPS held that the cases cited were inapplicable, as they related to re-hearings by way of appeal: whereas the present proceeding was strictly an appeal, and the Respondent therefore could not open the whole case without a cross-appeal.

Mr. *Thesiger* then asked for leave to present a cross-appeal, though the twenty-one days allowed by rule 143 of the Bankruptcy Rules, 1870, had passed.

THEIR LORDSHIPS considered that they had jurisdiction to grant such leave, and that it was proper to grant it in the present case, as the company had not given notice of appeal till the last day. Their Lordships thought it reasonable that a party who might be willing to acquiesce in an order as it stood should have an opportunity of contending that it ought to be varied in his favour if the other party appeals from it. Their Lordships accordingly gave the Respondent leave to appeal, and adjourned the hearing of the present appeal, the Respondents paying the costs of the day.

Solicitors: Messrs. *Linklater & Co.;* Mr. *J. W. Marsh.*

(1) 5 D. M. & G. 517, 523. 18 Jur 843. (2) 1 D. M. & G. 240.

L. JJ.
1872
July 30.

Ex parte LIVERPOOL LOAN COMPANY.
In re BULLEN.

Execution for Sum exceeding £50—Bankruptcy Act, 1869, *s.* 87.

1 Ex D. 148, 149, 146
4 Ch D. 522,
5 Ch D 376-7,
6 Ch D. 333,
7 Ch D. 882
10 Ch D 170
8 Q.B.D 392
395-6
9 QBD 433
11 QBD 432

Judgment having been entered up against a trader for £48 19*s*., the sheriff levied and sold goods of the debtor to the amount of £50 11*s*., being the amount of the judgment, with £1 12*s*. for the costs of the execution:—

Held (affirming the decision of the Chief Judge), that the goods had "been taken in execution in respect of a judgment for a sum exceeding £50 and sold" within the meaning of the *Bankruptcy Act*, 1869, s. 87; and that the proceeds must be paid to the trustee in bankruptcy, and not to the execution creditor.

THIS was an appeal from a decision of the Chief Judge affirming a decision of the County Court Judge at *Liverpool*.(1)

On the 2nd of June, 1871, the *Liverpool Loan Company* signed judgment against the partners in the firm of *J. & H. Bullen* for £52 19*s*. 9*d*., being the amount of a debt of £45, with £2 10*s*. 3*d*. for interest and £5 9*s*. 6*d*. for costs. Execution was issued almost immediately; but before it issued the debtors paid £4 on account, thus reducing the amount to £48 19*s*. 9*d*. The sheriff was directed to levy the £48 19*s*. 9*d*., with £1 12*s*. for the costs of execution, making together £50 11*s*. 9*d*. He seized on the 3rd of June, and sold the goods on the 6th.

On the 10th of June, 1871, two of the partners in the firm of *J. & H. Bullen* were adjudicated bankrupts. On the 14th the remaining partner filed a petition for liquidation; and on the 30th of June a resolution was come to for liquidating his affairs by arrangement. The same person was appointed trustee of both estates.

The question then arose whether the execution creditor must be paid out of the proceeds of the seizure and sale, or whether the proceeds ought to be paid to the trustee. The County Court Judge at *Liverpool* decided in favour of the trustee, and this decision was affirmed by the Chief Judge. The *Liverpool Loan Company* appealed.

Mr. *W. Potter*, for the appeal:—

The question turns on the *Bankruptcy Act*, 1869, s. 87, with

(1) See WN (1872) 169. CJB.

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which must be read sect. 6, sub-s. 5. It is submitted that, upon the fair construction of the Act, these provisions apply only where the judgment is for a sum exceeding £50, and that the costs of execution are not to be taken into account. The provision as to deducting expenses in sect. 87 confirms this view.

Mr. *Wheeler, contrà,* was not called upon.

SIR W. M. JAMES, L.J.:—

In this case two Judges have decided that the 87th section applies if the sum for which the sheriff levies, including the costs of execution, exceeds £50; and that the true construction of that section is "taken in execution for a sum exceeding £50 in respect of a judgment." This appears to me to be the plain meaning of the words, that they apply where a levy has been made for more than £50 and the goods sold. The amount of £50 being a merely arbitrary limit, for which no reason can be assigned, there is nothing else to go upon than the words which the Legislature has used.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *E. Byrne;* Messrs. *Bower & Cotton.*

MERRY *v.* NICKALLS.

[1869 M. 125.]

L. JJ.
1872
July 23, 24, 31.

Custom of Stock Exchange—Sale of Shares—Infant Transferee—Liability of Jobber.

The Plaintiff, through his stockbroker, contracted with the Defendant, a jobber on the *Stock Exchange*, for the sale of fifty shares in a company. On the name day the Defendant gave in to the Plaintiff's brokers a ticket with the name of *L.* as the intended purchaser, which had been passed to him by another jobber. A transfer to *L.* was accordingly executed by the Plaintiff; but it was afterwards discovered that *L.* was an infant, and the transfer was never registered. In a suit by the Plaintiff against the defendant for an indemnity against calls:—

Held (reversing the decision of *Bacon*, V.C.), that the Defendant, not

SC

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15 Eq 367-8, 9
9 Ch 418 n. 421,
7 HL 533
1 App Cas 87.

having given the name of a transferee who was capable of accepting the transfer, was not discharged from liability, although the ten days limited by the rules of the *Stock Exchange* for objecting to a proposed transferee had expired before the execution of the transfer.

Maxted v. *Paine* (1st action) (1) approved.

Rennie v. *Morris* (2) overruled.

Observations on the judgment of *Blackburn*, J., in *Maxted* v. *Paine* (2nd action) (3).

In sales of shares on the *Stock Exchange* the ultimate contract is not between the vendor's broker and the purchaser's broker, but between the vendor and the purchaser named on the ticket, who are brought together by means of the jobber; and therefore, until a person is named who is capable of contracting, and who has given authority for the use of his name, the jobber is not discharged from liability to the vendor.

Followed at law Dent v. Nickalls 22 W R 218
Affd in H L L R 7 H L 530

THIS was an appeal from a decree of Vice-Chancellor *Bacon* dismissing the Plaintiff's bill.

On or shortly before the 11th of July, 1865, *William Lucas Merry*, being the registered owner of fifty shares in the *General Estates Company, Limited*, instructed Mr. *George Burnand*, of the *Stock Exchange*, a member of a firm of stockbrokers, to sell the shares for him; and on the 11th of July, 1865, *Burnand* entered into a verbal agreement with a Mr. *Patteson Nickalls*, a stockjobber, also a member of the *Exchange*, for the sale to *Nickalls* of fifty shares (which were of the nominal value of £20, £2 having been paid up) at a premium of £2 a share, making, with the £2 already paid up, the sum of £4 a share; the purchase to be completed on the 1st of September following.

A few days afterwards *Nickalls* sold fifty shares in the same company to a Mr. *Baker*, another member of the *Exchange*, who a few days previously had sold a like number of similar shares to Mr. *Allen*, a broker, who was also a member.

On the 31st of August, which was the "name" day, *Allen* passed to *Baker*, who passed to *Nickalls*, the name of *Edward Richard Lloyd* as the purchaser of the shares; the purchase-money was paid, and a transfer of *Merry's* fifty shares to *Lloyd* was executed by *Merry*, and by *Nickalls'* direction was handed to *Allen*.

It appeared from the evidence that *Allen* acted as the broker of

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(1) Law Rep. 4 Ex. 81.

(2) Law Rep. 13 Eq. 203.

(3) Law Rep. 6 Ex. 132.

See an application to stay proceedings pending an appeal (L R 8 Ch 205. L.JJ.

Mr. *J. C. Hodges*, the manager of the company, by whose instructions he passed the name of *Lloyd*.

On the 27th of November, 1866, an order was made for winding up the company, and about the same time the Plaintiff discovered that the transfer had not been registered, and consequently that his name was still on the register, and that *Lloyd* was an infant.

On the 9th of July, 1868, a call of £18 a share, making £900, was made upon *Merry*, who, on the 27th of April, 1869, filed the present bill against *Nickalls*.

The Plaintiff alleged that, "according to the usage and practice of the *Stock Exchange*, a stockjobber who has entered into an agreement for the purchase of shares in a company is bound either to nominate, by the day fixed for the completion of the purchase, a *bonâ fide* transferee of such shares capable of effectually accepting the transfer thereof, or to accept a transfer thereof into his own name;" and prayed for a declaration that the Defendant was bound specifically to perform the contract entered into by him for the purchase of the shares, and to indemnify the Plaintiff against all liability in respect thereof.

On the 14th of March, 1870, the Defendant filed an answer, in which, as well as in his affidavit, he made statements to the following effect:—

According to the rules and usage of the *Stock Exchange* its members deal with one another as principals, whether they act as brokers or not, and persons outside who employ members as brokers are not recognised as parties to any transactions between members. For the convenience of business, there has grown up a distinction between brokers and jobbers. The business of a jobber is to bring together buyers and sellers, or, in other words, to make a ready market. When a broker is instructed by his principal to sell shares on the *Exchange*, he applies to a jobber to make a price for the class of shares in question, without saying whether he desires to sell or buy, and the jobber thereupon names two prices; the lower being his price to buy, and the higher his price to sell, but in either case it is always implied and understood that such buying or selling on the part of the jobber is to be subject to the rules and usage of the *Exchange*. According to these rules, if the broker agrees to sell, the sale is for a certain specified day called

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the "account day," which is fixed by the committee of the *Exchange.* In the case supposed, where the jobber stands as purchaser, he is bound, on the day preceding the account day, usually called the "name day," to pass to the broker the name of a person as the purchaser of the shares; or he may, if he pleases, pass his own name as such purchaser, in which latter case only is he bound himself to take to the shares. If the jobber fails to procure such purchaser by the name day, the selling broker can sell out the shares against him, and compel him to pay any loss thereon. Until the name day, it is not seen who may stand ultimately either as purchaser or seller; in other words, who are to be the parties to the transfer; and until then a jobber may have had a great many transactions of buying and selling with the same or with various brokers or jobbers; there being in every transaction, until the name day, the right on both sides to find a new name either as purchaser or seller. On the name day, in the case supposed, if the jobber having purchased has sold again, a ticket with the name of the ultimate purchaser on it will have been issued by and passed on from the ultimate purchasing broker to his seller, and so on through all the intermediate sellers and buyers, until it reaches the hands of the original selling broker. Every member passing a ticket is required to write on it the name of the member to whom it is passed. Such ticket will also have contained the amount of purchase-money agreed to be given by the ultimate purchasing broker, and also a note that he will pay the same. So many transactions of this kind take place during the account, that on the name day the ticket remains in the hands of an intermediate jobber only for the space of time necessary for taking the particulars of it. Sometimes the same ticket passes through the same member's hands several times, he having neither the opportunity, time, nor means to make inquiries respecting the name so passed. Tickets sometimes have the names of more than a hundred members indorsed on them. The original selling broker is not bound to deliver a transfer of the shares to the ultimate purchasing broker until the expiration of ten days after the account day, and during these ten days the purchasing broker cannot buy in the shares against the seller. During this time it is open to the original selling broker to object to the name passed by his buyer, in which case the buyer passes on the objection to the person from whom he received the name, and practically such buyer has no liability or interest in the matter, as whatever grounds there may be for objecting to the name they must be met by the person from whom the name emanates, and who originally issues the ticket. The committee of the *Stock Exchange* will, in such a case, if appealed to by the selling broker, decide as to the validity of such objection, and will, if they think it right, require another name to be given. But after the lapse of these ten days, the selling broker is required to deliver the certificates and transfer of the shares to the ultimate purchasing broker, or, in default, the latter can buy in the shares against the seller. After the transfer has been executed, the committee will not consider any objection laid before them, except on the ground of fraud. The usual course of business is for the selling broker to deliver the transfer, together with the corresponding ticket, to the ultimate purchasing broker, from whom he is to receive the purchase-money. The ultimate purchasing broker does not know to whom his ticket has been ultimately passed until the delivery of the transfer. According to the long-established rules and usage of the *Exchange*, if the original selling broker does not deliver his transfer and certificates, and obtain payment of the purchase-money within fifteen days from the "name day," the immediate buyer is released from all loss occasioned by the default of the ultimate purchasing broker to pay for the same; and the latter alone remains responsible. In like manner, if the member who issues the ticket containing the name of the intended transferee does not buy in or attempt to buy in the shares within fifteen days from the "account day," his immediate seller is released from all loss caused by the failure of any member through whose default the shares are not delivered. Subject as aforesaid, when the deed of transfer has been delivered to and the purchase-money paid by the ultimate purchasing broker, the jobber has fulfilled all the obligations required of him by the rules and usage of the *Stock Exchange.* In an ordinary transaction he is not held liable for the non-registration of the transfer. If the selling broker wishes to secure the registration of the transfer, or the exoneration of his principal from all future liability, he makes a special bargain with

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the jobber in express terms. The consideration expressed in the transfer is required to be the consideration specified in the ticket so passed, and the broker whose ticket is so passed is bound to pay the amount of such consideration to the person who produces the ticket, on such person handing to the broker the certificates and transfer. If there are any differences between the prices for which the shares have been sold and purchased, such differences are settled in account on the account day by the several members who have sold and purchased, without waiting for the completion of the transfer. The holder of the ticket who is to deliver the shares, and the issuer of the ticket who is to take them, complete the transaction without communicating with the intermediate parties. The holder and issuer may continue the transaction to the next account, or close the bargain by purchase and sale, without consulting the intermediate parties. In cases where a member of the *Exchange* has contracted to sell shares, all of which have not been purchased from the same person, he retains the original ticket passed to him, and passes separate tickets to the several persons from whom he purchases the shares; the name of the transferee and the amount per share named in the subdivided or split ticket being the same as in the original ticket; and in cases where a member who has contracted to buy shares does not sell them all to the same person, he is entitled to one or more tickets from each person to whom he has sold in respect of the particular shares so sold to that person.

The Defendant also alleged that if within ten days from the 1st of September the Plaintiff had objected to the name of *Lloyd* on the ground of his being an infant, the committee of the *Stock Exchange* would have entertained such objection, and would, if they had found it valid, have compelled *Allen* to pass another name; and submitted that, as ten days from the 1st of September, 1865, had been allowed to elapse without any such objection being taken, he (the Defendant) was thenceforward subject to no liability.

Mr. *Capper*, a stockbroker, a witness for the Plaintiff, deposed that, according to the custom and usage of the *Stock Exchange* as they existed in July and September, 1865, a stockjobber who entered into an agreement for the purchase of shares in a company was bound either to nominate, by the day fixed for the completion of the purchase, a transferee of such shares "capable of effectually accepting and willing to accept the transfer thereof," or to accept a transfer thereof into his own name. He denied the statement in the answer that after the transfer has been executed the committee of the *Stock Exchange* will not consider any objection except in cases of fraud, and brought forward an instance which had occurred in his own experience to the contrary. In February, 1865, he sold fifty shares in a company on the *Exchange*, and the name of *Richard Amery* was passed to him. The transfer from him to *Amery* was executed and the transfer registered, after which it was found that *Amery* was an infant, whereupon the deponent was placed on the list of contributories. The committee of the *Stock Exchange*, although there was no suggestion of fraud, entertained the case, and decided that "the broker who had passed the name" of *Amery* was bound to indemnify the deponent, and accordingly the broker paid to deponent the amount of the calls which had been made upon him. Afterwards, in proceedings in Chancery, the Master of the Rolls decided against the deponent, and the deponent's petition of appeal was dismissed with costs.

In reply, the Defendant filed an affidavit, in which he said that the decision of the committee, directing the broker to indemnify Mr. *Capper*, was in accordance with the rules and usages of the *Exchange*, it having then been the practice of the committee, in cases where shares had been transferred into the name of a minor or of some other person to whom reasonable objection had been established, to hold that the member who issued the ticket with such name should be liable to indemnify the transferor; but since the recent decisions of the Court of Chancery, holding the real buyer liable to indemnify the transferor, the committee had ceased to hold the broker responsible in such cases, and had left the transferor to his legal remedies against the transferee or the real buyer. The committee had never, after delivery of the deed of transfer and certificates, and payment of the purchase-money, held a jobber, or other member occupying the position of a middleman between the transferor and the transferee, liable to indemnify the transferor in respect of calls made upon shares the subject matter of the dealing.

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The evidence of the Defendant as to the rules and regulations and the usage of the *Stock Exchange* was supported by the testimony of Mr. *De Zoete,* deputy chairman of the committee, and by Mr. *Underhill,* a member of the *Stock Exchange,* who stated their opinion that if the name on the ticket be accepted by the transferor, and a transfer made, the jobber is discharged, even though the name may turn out to have been given without authority.

Mr. *Tatham,* a broker also, made an affidavit in reply to Mr. *Capper's* evidence.

In the course of the argument reference was made to the printed rules of the *Exchange,* which are issued to the members from time to time. These rules, as they existed at that date, are given at the end of the report of *Grissell* v. *Bristowe* (1).

The Vice-Chancellor held that the Defendant, having furnished a name which had not been objected to within ten days, was discharged from liability, and dismissed the bill (2). From this decision the Plaintiff appealed.

(1) Law Rep. 4 C. P. 53.

(2) 1872. March 20. W/N (1872) 72

SIR JAMES BACON, V.C. :—

It has been said, no doubt with great truth, that the question raised in this case is a very important one. Important it is to the parties concerned, as all cases are; but it is very important also in a general point of view, because it relates to transactions of great multiplicity and enormous amount upon the *Stock Exchange.* It has engaged the attention of various Courts on various occasions. The particular cases submitted to the Courts have been referred to as the authorities on either side in the course of the present argument.

But of all these cases, that which has been last mentioned, *Rennie* v. *Morris* (Law Rep. 13 Eq. 203), is the only one which seems to me to have any direct application to the present. The facts, it is admitted, are exactly the same in both cases—the law therefore ought to be the same. If I had found that the cases at common law were directly at variance with the decision in *Rennie* v. *Morris,* then I should have been obliged to pause before I decided to which side I would adhere—whether I would adopt the principle of the common law cases, or whether I would follow the decision of the Master of the Rolls. I do not find any such diversity; but I do find that the Master of the Rolls came to the conclusion which is expressed in his judgment upon principles and upon law which were not adverted to in any of the cases at common law.

The Master of the Rolls found, as a matter of fact clearly proved before him, that there was a rule and a practice, amounting to a law, on the *Stock Exchange* by which the dealers on the *Stock Exchange,* brokers and jobbers, are equally bound; and that the effect of that law was, that if a jobber enters into a contract, it is to be executed according to the forms and rules which are there prevalent; that the parties entering into the contract must be

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Mr. *Eddis*, Q.C., and Mr. *Davey*, for the Appellant:—

The Vice-Chancellor followed the authority of *Rennie* v. *Morris* (1); but that decision is inconsistent both with prin-

taken to have known these rules, and must be taken to be bound by them. I cannot depart from that principle. The evidence in that case and the evidence in this case as to the law on the *Stock Exchange* are exactly the same. The Master of the Rolls in his judgment points out very clearly indeed the ground upon which he proceeds. At page 208 the usage is thus shortly stated by the Master of the Rolls:—

"The seller, through his broker, applies to the jobber who bought from his broker, and the jobber who bought refers to the broker who bought from him. The broker, when so applied to, either gives up the name of his principal, that is, the person who instructed him to buy, or he refuses so to do." The Master of the Rolls then goes through the facts of that case, tracing the several purchasers who had given the names of their principals, and then comes to Mr. *Lancashire*, who declined to do so; and then points out the course which the Plaintiff, in pursuit of his real remedy, might have pursued, namely, that of attacking Mr. *Lancashire*, who refused to give up the name of his principal. That means that Mr. *Lancashire's* principal was the person liable, and not the Defendant in the suit. His Lordship adds: "In no case, in my opinion, is any one of the intermediate purchasers, who tell all they know, liable to the Plaintiff. Were a different course to be adopted, and were this Court to make the person who entered into the immediate contract liable, it is clear that the matter would give rise to as many suits as there were jobbers in the transaction; and so in every *Stock Exchange* transaction every jobber would be liable to his vendor *toties quoties*, until at last you got to the ultimate broker, and from him to the person who employed him." He adds: "The usage of the *Stock Exchange* very properly obviates this necessity; and as it is clear that the person who is the real purchaser, and gave the first instructions, would be ultimately liable, it puts an end to the multiplicity of suits brought to make each person liable to his vendor. Such a course would be wholly opposed to the real principles of equity, which aims at shortening litigation; and on the same principle the custom jumps over the heads of the innocent persons, and makes the real delinquent the person primarily and exclusively liable."

The cases which have been referred to, most of which, be it observed, were decided in favour of the jobber, notwithstanding the observations which have been made upon *Coles* v. *Bristowe* (Law Rep. 4 Ch. 3), and *Grissell* v. *Bristowe* (Law Rep. 4 C. P. 36), do not touch that which is put prominently forward in the answer and in the evidence, as the Defendant's case here. After stating at full length what he conceives to be the rules of the *Stock Exchange*, which are in evidence, and clearly proved to be the existing rules and laws binding the members of this community called the *Stock Exchange*, the Defendant gives in detail the dealings which he had with these shares. It is unnecessary, perhaps, to observe that he is a jobber who buys

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(1) Law Rep. 13 Eq. 203.

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ciple and authority, and this Court will not hold itself bound by it. The law has been settled by a current of authorities since the customs of the *Stock Exchange* came to be discussed in Courts of Law and Equity.

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upon the terms there agreed upon, namely, that he should at the settlement day complete his purchase after the ten days within which the shares are to be delivered. As a jobber, of course he did not mean to keep these shares. That may be readily assumed. He bought them that he might deal with them for his own benefit, and he says that he dealt with them thus: first, "I dealt with Mr. *Burnand* as a principal, and not as an agent. The dealing, although it may be called a purchase, was in reality, as hereinbefore explained" (that is, in the passage of the answer which states the rules of the *Stock Exchange*), "a contract in accordance with the said rules. I did not know that he was acting as the agent of the Plaintiff; it being one of the rules of the said *Stock Exchange*, as is hereinbefore mentioned, that the members thereof do not recognise in their dealings any other persons than themselves. The dealing had reference to no specific shares, but to any fifty shares of the said company. Mr. *Burnand* was bound by his contract to provide by the account day, not necessarily the fifty shares mentioned in the Plaintiff's bill, but any fifty shares whatever of the said company. The dealing, though it may be called a purchase, was in reality, as hereinbefore explained, a contract, in accordance with the said rules and usage, on my part to pass to the said Mr. *Burnand*, on the name day for the next account, a name as purchaser, and to pay the said price; and on Mr. *Burnand's* part to hand over thereupon the certificates of the said shares, and to pass a transfer thereof within the ten days aforesaid. Subsequently I sold (using the term 'sold' with reference to the ordinary transactions hereinbefore explained in accordance with the said rules and usage) fifty shares, but not any specific shares of the said company, to Mr. *Baker*, a member of the said *Stock Exchange*"—at a price which he mentions. "On the 8th of July, 1865, Mr. *Baker* sold fifty shares of the said company to Mr. *Allen*, a broker and member of the said *Stock Exchange*, at a premium of £3 10s. per share. The said Mr. *Allen* alleges that he acted in this transaction as the broker or agent of Mr. *James Clifford Hodges*, who was at that time the manager of the said company, and it appears that Mr. *Hodges* instructed Mr. *Allen* that the transfer was to be made into the name of *Edward Richard Lloyd*, in the Plaintiff's bill named as being the person on whose behalf the purchase was made. Accordingly, on the name day, the 31st of August, 1865, Mr. *Allen* passed on to Mr. *Baker* a ticket with the name of the said *Edward Richard Lloyd* thereon, as being the person to whom the shares were to be transferred. Mr. *Baker* passed this ticket on to me, and I passed it on to Mr. *Burnand*. The 1st of September, 1865, and not the 5th of September, 1865, was the day fixed for the special settlement of transactions in shares of the said company; no previous settling day having been appointed. For ten days after the said 1st of September, 1865, it was, as hereinbefore explained, open to the Plaintiff to

According to the custom of the *Stock Exchange* the original vendor of shares, through his broker, contracts with a jobber that the jobber will either purchase the shares himself or supply the

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object to the said name of *Edward Richard Lloyd*. If the said *Edward Richard Lloyd* were at the time, as the Plaintiff alleges, an infant, that would, no doubt, have been a valid objection, and one which the committee of the *Stock Exchange* would have allowed, and the consequence would be that the said Mr. *Allen* (assuming that he was, as I believe in fact he was, the person from whom the said name emanated) would have been compelled to pass another name to which no objection could be taken; and, in effect, I should have had no responsibility, risk, or trouble in the matter, which would thus have been disposed of between the ultimate and actual buyer and seller, so brought together by means of my intervention." I believe that is all that is necessary to refer to from the answer.

Then the evidence of the deputy chairman of the *Stock Exchange* is perfectly conclusive, and establishes the case beyond any doubt. He has been cross-examined; but I do not see that it would be useful to refer to any part of that cross-examination. He proves the practice of the *Stock Exchange* to be, that * the successive buyers, the brokers, to whom, in this case, the Defendant *Nickalls* sold, from time to time, as they become purchasers, pass on the name to their immediate vendors, and so, in this case, the name ultimately came to the jobber *Nickalls*, who had to hand the name over to Mr. *Burnand*, the broker for the Plaintiff. All that seems to have been done with the utmost regularity. The money was paid; the transfer was executed; the shares delivered; and the matter was thereupon concluded.

But then it is said that inasmuch as the name which was upon the ticket is the name of an infant who was incapable of entering into any contract, the contract between the Plaintiff and the Defendant is not performed, and that it is as much a sham as if it were an imaginary name. That would be true if the transaction could be severed from the custom of the *Stock Exchange* —if it were a transaction relating to some other things than these which are the subject of the present suit. The buyer, who undertakes to pay the money and to provide a name, does not satisfy the obligation he comes under, unless he not only pays the money but furnishes a proper name; and if that were incumbent on Mr. *Nickalls*, it cannot be said in this case that he has acquitted himself of that obligation.

But that is not the contract between the parties, as the evidence proves. The contract is: "I will pay you a sum of money; in consideration of that promise I shall deal with these shares as I think fit between this and the next settling day; if on that day I have not sold them, I will pay you the money or give you a name on my own responsibility; but if in the meantime I sell and they are sold again to a dozen or a hundred different people, you shall be satisfied if I bring you the broker's ticket, with a name upon it, because I shall thereby have shifted the responsibility from myself; I shall have done all which it is incumbent upon me to do when I give you the name of a broker; I give you the name of a man whom the committee of the *Stock Exchange* will make answerable

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name of a purchaser who will purchase them; but if the person whose name is supplied is not capable of contracting, or has given no authority for the use of his name, it is the same as if no name

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to perform that term of the agreement which, if I had not parted with the shares, I should have been bound to perform, but with which, having parted with them, and furnished you with the broker's certificate and the name, I have nothing further to do."

Nor is there anything unreasonable or unjust in that mode of looking at the contract. The Plaintiff sustains a grievous loss by the fact of an infant's name being substituted as the transferee; but he is not without remedy. The evidence of Mr. *De Zoete* in the 5th paragraph of his affidavit is this: "If the selling broker had discovered that the name passed to him was that of a minor or person under disability, such as a married woman or lunatic, and within the said ten days and before delivery of the transfer had objected to such name, he could have called upon the jobber to furnish him with another name, who, in his turn, could have called upon the ultimate purchasing broker to do the same; and if the latter had failed to do so, the said selling broker might have appealed to the committee, who, if such fact had been established, would have ordered the said ultimate purchasing broker to furnish a name to which the above objections would not have been applicable." Then he says in the 6th paragraph: "In like manner, if the name of the proposed transferee had proved to have been that of a servant or person in needy circumstances, and a mere nominee of the real buyer, which the latter had passed or directed to be passed for the purpose of evading liability, the committee, on appeal within the ten days, and before the delivery of the transfer, would have directed the said ultimate purchasing broker to furnish another name." So that the remedy seems to be clear under the laws which bind the Plaintiff and the Defendant. As to the ten days, the evidence of Mr. *Capper* shews that that sort of equitable jurisdiction which the committee of the *Stock Exchange* exercises over its members is not limited to ten days, although ten days are here referred to in a somewhat indistinct way. If I am to be guided by what appears to have been affirmed in *Rennie* v. *Morris* (Law Rep. 13 Eq. 203), it rather refers to that period of ten or fifteen days within which the selling broker may buy in as against the man who has failed to complete his contract.

But, clearly, he is not without remedy. It is not a case in which a man enters into a contract which is broken by the other party, and which leaves the seller entirely without relief. Here is a clear remedy which might have been resorted to by the Plaintiff with the greatest readiness. Instead of taking that remedy, what he prefers * is to file a bill in this Court, and to make his claim, supporting that claim by an argument which would perhaps be justifiable on general principles, and quite in accordance with the common law cases. But because the jobber to whom he sold has failed to perform perhaps the most important consequence of the contract, which is clearly of much greater importance than the mere price of the shares—that the Plaintiff can, thereupon, upon the general principles and doctrines of equity, claim from that jobber the performance of a contract which never entered into the minds of

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had been given, and the jobber is still liable. Here the name given was that of an infant, who had no power to contract or give authority to use his name. All the cases are consistent with this principle. In *Grissell* v. *Bristowe* (1) the Court of Exchequer decided in favour of the jobber; but it was stated that the usage was that the substituted person must be "one who was able and willing to perform the contract" (2). In *Coles* v. *Bristowe* (3) Lord *Cairns* repudiated the doctrine that the jobber was released from liability "whether the name supplied was objectionable or unobjectionable, whether the person denoted did or did not accept the shares" (4). In *Cruse* v. *Paine* (5) the jobber was held liable because the purchaser, although he executed the transfer, did not

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either of them as being to be performed by the jobber, except only in one case, that of the jobber keeping the shares until the settling day—cannot be supported. If he had done that, then of course he would have been personally liable to perform both the terms of the contract.

I cannot think, therefore, that I should be doing right in departing in the slightest degree from the judgment of the Master of the Rolls in the case of *Rennie* v. *Morris* (Law Rep. 13 Eq. 203). The cases are identical. The evidence given in each case, as far as I know from the description of what was the evidence in the case before the Master of the Rolls, is the same. The evidence before me is clear and distinct—establishing this practice on the *Stock Exchange*, which I am bound to adopt as the plain law between the parties here litigant.

I think I have pointed out that the Defendant has in no way failed to perform all that it was incumbent upon him to perform towards the vendor, and that, therefore, there is no ground whatever for the claim which is made to hold the jobber liable for the consequences of the name of the infant having been used in this contract, unknown to the vendor, and unknown, as I must believe on the evidence, to the jobber. It is not suggested that there was any fraud, misrepresentation, or wilful doing of wrong. I believe what is stated, that the Plaintiff was not without a remedy, easier, more rapid, and less expensive than he could have had in this Court. If that has failed him, it can only be through the lapse of time that it has failed, because, by some rule which I know nothing about, the *Stock Exchange* would not now entertain a complaint which, in its origin, would have been a perfectly good complaint—not against Mr. *Nickalls*, for he has done all that it was incumbent upon him to do, but against the last broker, *Allen*, who had brought in the name of Mr. *Hodges*, who had been connected with the wrongful act of inserting the name of an infant in that transfer of shares which the infant was not capable either of accepting or of performing the obligation of. I am therefore of opinion that the Plaintiff's bill must be dismissed, but without costs.

(1) Law Rep. 4 C. P. 36.

(2) Ibid. 47.

(3) Law Rep. 4 Ch. 3.

(4) Ibid. 11.

(5) Ibid. 441.

get it registered. In *Maxted* v. *Paine* (1st action) (1) the jobber having supplied the name of a person who had given no authority for the use of his name, was held liable. That case really governs the present. *Allen* v. *Graves* (2), *Bowring* v. *Shepherd* (3), and *Paine* v. *Hutchinson* (4) are also in our favour. In *Maxted* v. *Paine* (2nd action) (5) the jobber was held to be discharged; but in that case the person named, although a man of straw, was capable of executing the transfer.

The ten days' rule has no application to this case. There is no evidence to shew that the committee of the *Stock Exchange* has ever entertained a case of this kind within the ten days, or refused to entertain it after that period. All that the witnesses depose to is as to what, in their opinion, the committee would do. Mr. *Capper* refers to a case in which the committee did entertain an application after the ten days' period had elapsed.

Mr. *Higgins*, Q.C., and Mr. *Buchanan*, for the Defendant:—

The case is covered by authority. In *Rennie* v. *Morris* (6) the Master of the Rolls only followed the opinions of the majority of the Judges in *Maxted* v. *Paine* (2nd action). It is remarkable that both in law and in equity the decisions of the Courts of first instance were against the jobber. In *Coles* v. *Bristowe* (7), *Grissell* v. *Bristowe* (8), and *Sheppard* v. *Murphy* (9), it was held that the jobber could not discharge himself unless the vendor accepted the name he gave; but in each case the Courts of Appeal held a different view, and the result of the decisions is, that if a jobber passes a name, and no objection is made within the ten days allowed by the custom, the jobber is discharged.

The basis of the usages of the *Stock Exchange* is that the members deal with one another in all contracts as principals. Brokers and jobbers are alike members of the *Exchange*, and are all bound by this rule. This principle is clearly worked out in Mr. Justice *Blackburn's* judgment in *Maxted* v. *Paine* (2nd action). The result is that the ultimate contract is not between the owner

(1) Law Rep. 4 Ex. 81.
(2) Ibid. 5 Q. B. 478.
(3) Ibid. 6 Q. B. 309.
(4) Ibid. 3 Ch. 388.
(5) Law Rep. 6 Ex. 132.
(6) Ibid. 13 Eq. 203.
(7) Ibid. 6 Eq. 149.
(8) Ibid. 3 C. P. 112.
(9) Ir. L. Rep. 1 Eq. 590.

of the shares and the person whose name is on the ticket, but between the vendor's broker and the broker who produces the ticket; and all that is necessary for the discharge of the jobber is that he can shew that a name has been passed by some broker who is a member of the house, and has not been objected to within ten days by the vendor. The contract being with the broker, it can make no difference whether the name which he passed is that of a person who is able to accept the transfer or not. He may be liable himself to the vendor, but the intermediate jobbers are discharged. The decision in *Maxted* v. *Paine* (1st action) (1) is not applicable, for in that case there was a special contract that registration should be guaranteed.

Again, although in the present case the name on the ticket was that of an infant, there was a real purchaser behind, namely, *Hodges;* and if the vendor cannot hold the purchaser's broker liable for passing the name of an infant, which he might probably do, he can proceed against the real purchaser of the shares for an indemnity: *Castellan* v. *Hobson* (2); *Stikeman* v. *Dawson* (3); *Nelson* v. *Stocker* (4); *Shepherd* v. *Gillespie* (5); *Duncan* v. *Hill* (6); *Weston's Case* (7).

Mr. *Eddis,* in reply.

July 31. Sir W. M. James, L.J.:—

In this case a very short point is raised for our decision, namely, whether the cases of *Coles* v. *Bristowe* (8) and *Grissell* v. *Bristowe* (9) extend to cover the case of a jobber who has given in the name of an infant as the ultimate purchaser to whom the transfer is to be made. There is really no dispute as to the facts of the case.

The Plaintiff, through his broker on the *Stock Exchange,* entered into a contract with a jobber on the *Stock Exchange* for the sale of his, the Plaintiff's, shares in a joint stock company.

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(1) Law Rep. 4 Ex. 81.
(2) Ibid. 10 Eq. 47.
(3) 1 De G. & Sm. 90.
(4) 4 De G. & J. 458.
(5) Law Rep. 5 Eq. 293.
(6) Ibid. 6 Ex. 255.
(7) Ibid. 5 Ch. 614.
(8) Ibid. 4 Ch. 3.
(9) Law Rep. 4 C. P. 36.

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There is no doubt there was a contract made with the jobber by which the jobber was bound. The contract was to be fulfilled on a certain day, according to the custom and practice on the *Stock Exchange*. In the meantime the jobber had sold the shares, and there had been one or two subsequent sales, and on the day when the contract had to be completed the jobber handed in to the Plaintiff's broker the name of a transferee, that name having reached the jobber's hands from a person who was the broker of the ultimate purchaser of the shares. Thereupon the broker accepted that name, and the transfer was executed by the Plaintiff to the person named as transferee. It turned out that that person was an infant.

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Now the Master of the Rolls has held, in the case of *Rennie* v. *Morris* (1), which the Vice-Chancellor has followed on this occasion, that under such circumstances the jobber was discharged. In *Maxted* v. *Paine* (1st action) (2), before the Court of Exchequer, in which a person's name had been given without authority, the Court of Exchequer came to the conclusion that the jobber remained liable notwithstanding the transfer to the person whose name had been so given without his authority. In the present case the infant certainly did not give any authority for the insertion of his name, for the best of all possible reasons, that he was legally incompetent to give any such authority. Therefore we have to decide whether there is any distinction between the two cases—the case in the Court of Exchequer, in which it has been decided that a transfer to a person who had not authorized the transfer to be made to him was nothing, and the case before us, which is the case of an infant who has in the like manner not authorized it, because he could not do so.

Now, how would the case stand on principle independently of authority? It appears to me that up to and at the moment when the jobber gave in the name to the broker the jobber was bound in law to complete the bargain which he had made. He was at that time under an obligation to take the shares from the Plaintiff, and to take them in such a way as to give the Plaintiff an entire release and indemnity against all future liability in respect of them. That was the nature of the transaction, that was

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(1) Law Rep. 13 Eq. 203.

(2) Law Rep. 4 Ex. 81.

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his position up to the moment when he gave in the name. What was the effect of giving in the name, and the execution of the transfer on the name being so given in? It cannot be said to be a fulfilment of the contract with the jobber. The contract remained unfulfilled. The shares still remained, in point of law, vested in the Plaintiff, because the transfer was a piece of waste paper. Therefore there was no fulfilment of the contract in that way.

Then was there anything which amounted to a release of the contract? Can it be said that the Plaintiff and Defendant met together and virtually discharged each other, one from the obligation to pay, and the other from the obligation to transfer? There is no pretence that there was any such thing. Was there anything in the nature of accord and satisfaction, or anything in the nature of *novatio contractus?* In my opinion it is impossible to say that a piece of waste paper or a void contract, professing to be made by a person incapable of entering into a contract, can amount to a satisfaction in law. It is equally impossible, in my view, to hold that there can be a *novatio contractus* when there is no new person capable of entering into the contract. That is how the case stands upon principle.

How is it upon authority? The principle of those authorities of *Grissell* v. *Bristowe* (1) and *Coles* v. *Bristowe* (2) was explained in a judgment which, to my mind, is binding upon us. It is a judgment of this Court given by the Lord Chancellor *Hatherley* in *Cruse* v. *Paine* (3), in which, while he distinguished the case on the ground that there was there a guarantee of registration, he laid down what the principle of the previous cases was. Lord *Hatherley* there says: "*Coles* v. *Bristowe* and *Paine* v. *Hutchinson* (4) had established that, in the case of an ordinary sale to a jobber, the real contract was that at the settling day he would either take the shares himself or give the names of one or more transferees, who would pay for the shares, and to whom no reasonable objection could be taken. In this case, however, there was superadded an express provision that the sale was made, not ordinarily and simply, but with registration guaranteed. These words introduced a material distinction, the exact meaning of which the Court was now called upon to arrive at. Sir *Roundell Palmer* had contended that the only meaning was that the vendor could call upon the jobber to proceed against the purchaser and compel him to register; but that was not a sound construction of the contract, which was one inseparable bargain for a price fixed with reference to this guarantee; and the terms were not merely that the jobber should find a purchaser who would pay for the shares and accept the transfer, but that the jobber should find a purchaser who would do that, and would also register the transfer, and until that had been done the jobber was not discharged from his engagement." That is to say, that in the simple case, from which that case was an exception, the bargain was that the jobber should find a purchaser who would pay for the shares and accept the transfer. In this case I am of opinion that the jobber has not found a purchaser who has paid for the shares and accepted a transfer, because the infant was utterly incapable of accepting the transfer. It seems to me, therefore, that according to the principle of the cases, as judicially expounded by the decision of the Lord Chancellor, it was essential to the discharge of the jobber that there should be a real purchaser, a man named who would pay for the shares and accept the transfer. In my opinion that is sufficient to dispose of the case.

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(1) Law Rep. 4 C. P. 36.
(2) Ibid. 4 Ch. 3.
(3) Law Rep. 4 Ch. 441, 443.
(4) Ibid. 3 Ch. 388.

It is true that in the second action of *Maxted* v. *Paine* (1), before the Court of Exchequer Chamber, there is a very elaborate judgment of Mr. Justice *Blackburn* which, when one reads it at length and considers the whole tenor of it, would appear to be rather an exposition of the law intended for the guidance of the House of Lords if and when the whole matter should ever come to be reviewed before that tribunal of ultimate appeal; because the thesis of the learned Judge is, not that the cases were wrongly decided, but that the cases were decided on a wrong principle. However, that is not the way a Court like this deals with the decisions of a Court of co-ordinate jurisdiction. The cases which are cited do not bind us as *res gestæ*, because they are *inter alios acta;* but they bind us in so far as they are authoritative expositions and statements of the law. It is the principle of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at the same conclusions. Therefore to say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is, that the decision of a superior Court is binding on an inferior Court and on a Court of co-ordinate jurisdiction, in so far as it is a statement of the law which the Court is bound to accept. The law as laid down by the Lord Chancellor is, that the jobber was entitled to be discharged if and if only he found a purchaser who would pay for the shares and accept a transfer.

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(1) Law Rep. 6 Ex. 132.

Having read the judgment of that learned Judge (Mr. Justice *Blackburn*) with great care, I am obliged to add that he has not satisfied me of the thesis which he purports to establish, that the cases were rightly decided on a wrong principle of law. I am bound to confess that he has very nearly satisfied me that the cases were wrong, if it were open to me to discuss them. He has nearly satisfied me that the jobber's contract was not completed until there was an actual registration, that is to say, that every contract did, in its very essence, imply that which was in terms expressed in *Cruse* v. *Paine* (1), that not only there should be a transfer, but that the transfer should be registered, so that the vendor should find himself in the position he contracted to be in, viz., actually released from and indemnified against all subsequent liabilities. However I am of opinion, if that was the law, it would be still more fatal to the contention of the Defendant in this case.

I am of opinion that the jobber has not discharged himself from his liability, either to take the shares himself or to take them by a person competent and willing to do so. That being so, I think that the judgment ought to be reversed, and that the Plaintiff is entitled to the relief which he asks by his bill.

SIR G. MELLISH, L.J. :—

I am of the same opinion. In the first place, I think the case now before us cannot be distinguished from *Maxted* v. *Paine* (1st action) (2). In that case the Court of Exchequer held that if the person whose name was on the ticket, and to whom the transfer was made, had given no authority to the broker who issued the

(1) Law Rep. 4 Ch. 441.

(2) Law Rep. 4 Ex. 81.

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ticket to insert his name, then, inasmuch as there was no purchaser to accept the transfer of the shares, the jobber was not discharged. In the present case the person whose name was put upon the ticket was a youth of sixteen, and the only evidence that is given as to his having, in point of fact, given any authority to put his name on the ticket was, that he remembered about that time, in 1865, the manager of the company used to ask him occasionally to execute transfers, some fully filled up and some in blank, but that he had no recollection of having executed any transfer in this particular case; and the transfer itself has not been found.

Under these circumstances it would be very difficult indeed, and, as it seems to me, absurd to say that the broker could have any authority to put the name of this boy in the ticket. I may observe that it is not exactly like the case where an infant purchases shares for himself, or even where a father, wishing to make a present to his son, who is an infant, buys shares and registers them in his name. In such a case there is a possibility that the infant might adopt the contract when he comes of age, and that it might be a contract for his benefit. But when an infant has no interest in the shares whatever, and is not intended to have an interest, but his name is simply used to free others from liability, it is utterly impossible that such a transaction can be for the benefit of the infant. In this case, therefore, it is quite clear that the infant never gave any authority to put his name in the ticket at all. That being so, the case comes within that decision of the Court of Exchequer, and the question we have to consider is whether we ought to follow that case, or treat it as overruled. Mr. Justice *Blackburn*, in his very elaborate judgment in the second action of *Maxted* v. *Paine* (1), stated principles which certainly cannot be reconciled with the decision in the first action of *Maxted* v. *Paine* (2); indeed, he as much as said that he did not agree with it. The decision of Lord *Romilly*, also, in *Rennie* v. *Morris* (3), which was the case of a transfer to an infant, cannot be reconciled with the principle upon which the Court of Exchequer acted. Therefore we have to consider what decision we will follow. Now, we are in some respects in a different position from the Judges in Courts of Law;

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(1) Law Rep. 6 Ex. 132.
(2) Law Rep. 4 Ex. 81.
(3) Law Rep. 13 Eq. 203.

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because in those cases, the custom had all been found by arbitration, and stated in the special case, and the Judges were bound by it. But here we are acting as Judge and jury, and have to say what the custom was, and whether the custom alleged, if it really existed on the *Stock Exchange*, was binding in point of law. This particular sale of which we have to consider the legal effect, was made as far back as July, 1865; it was made before the failure of *Overend, Gurney, & Co.*, before *Coles* v. *Bristowe* (1) or *Grissell* v. *Bristowe* (2) had been decided, and before the question had arisen to any serious extent, if at all, as to what the liability of jobbers was. Nevertheless, no doubt the practice and usage of the *Stock Exchange* was substantially the same then as it is now. But I think, as Lord *Cairns* said in *Coles* v. *Bristowe*, we ought to put a reasonable construction on the usages of the *Stock Exchange*. We must look not so much to what the jobbers, now five years afterwards, and when they are fully alive to the liabilities they may incur, may say they think is the legal effect of the usage of the *Stock Exchange*, but we must look at what the usage is, for what purpose it was instituted, and what is the proper legal effect of it.

Now, looking at the evidence in this case—we have the evidence of Mr. *Capper*, a broker, who has made an affidavit for the Plaintiff as follows: He states that the usage of the *London Stock Exchange* in July and September, 1865, was this, that a stockjobber who entered into an agreement for the purchase of shares in a company was bound either to nominate, by the day fixed for the completion of the purchase, a transferee of such shares capable of effectually accepting the transfer thereof, or to accept a transfer thereof into his own name. Therefore, according to that statement of the usage, unless the person whose name was on the ticket was a person who was both ready and able to accept the transfer of the shares, the jobber was not discharged.

Now, the evidence on the other side is of the Defendant himself and two other gentlemen, who state that they are members of the *Stock Exchange*, but do not in terms state whether they are jobbers or brokers, but I presume they are jobbers. They state the usage in substantially the same manner as it has been stated in all the numerous cases that have occurred; but they draw the inference that the jobber is absolutely discharged if the name of the man in the ticket is accepted, and a transfer made to him, although that transfer may be an utter nullity from the person having no authority. They draw that inference from the usage.

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(1) Law Rep. 4 Ch. 3.

(2) Law Rep. 4 C. P. 36.

Then I observe that Mr. *Tatham* is brought to make an affidavit for the purpose of accounting for one particular transaction which took place, which seems to have little or nothing to do with the present case. He being a broker is not asked to give any evidence of what the custom was. Therefore it looks as if there was a difference of opinion on the *Stock Exchange* as to what had been the usage at that time between the brokers and the jobbers.

Now, independently of the question whether the members of the *Stock Exchange* could legally make such a rule, I am not convinced as a matter of fact that it was a well-established rule of the *Stock Exchange* in the year 1865, that if the person named in the ticket turned out to have given no authority, then the jobber was discharged. As I understand the view which Mr. Justice *Blackburn* takes, and which has been now argued before us, it is this—that what is called the novation or substituted contract that is made when the jobber is discharged is not made with the person whose name is put on the ticket, but is made with the broker who issues the ticket; and this view is based upon the fact that the brokers and jobbers on the *Stock Exchange* deal only with each other, and enforce contracts only against each other. That, no doubt, is perfectly true, because the brokers have no jurisdiction over the principals, neither do they give any benefit to them. The principals cannot go on the *Stock Exchange* and get any redress from the *Stock Exchange* against a broker or a jobber; but beyond all question, the rule of law has always been that the undisclosed principal of the broker (because they must know that a broker has an undisclosed principal) may come in and sue upon the contract.

Now the real question is, giving a fair construction to the usage of the *Stock Exchange*, what is the contract which the undisclosed principal of the broker makes with the jobber? Is it a contract that he will take and accept the broker who issues the ticket as a person who is to be liable to him in lieu and instead of the jobber? Or is it a contract that he will take the person whose name is put in the ticket as a transferee and purchaser from him in lieu of the jobber, so that the jobber is not discharged from his contract with the purchaser unless a transfer is made to a person who has given authority to have that contract accepted? Beyond all question, in all the earlier cases, the opinion the Judges came to upon the real meaning of the rules of the *Stock Exchange*—and what I cannot help thinking is their real meaning—was that the real object of the rules was to bring the seller and the purchaser together, that is, not the broker and the jobber, but the real seller, the man who wants to dispose of the shares, and the real purchaser, the man who wants to get the shares transferred to him—to bring them together and enable them to contract with each other. The reason why it was necessary to have a ticket, and why these tickets pass through a great number of hands, is, as is well known, that besides purchasers and sellers on the *Stock Exchange* there are a great number of people who are not sellers or purchasers, but who are "bulls" and "bears," who are betting on the rise or fall of the shares between the time of making their contract and the account day; who never intend to transfer shares or to accept the transfer of shares, but only intend to receive and pay the difference. This is a most convenient usage to them, because as the ticket passes from hand to hand the differences are marked and paid, and these people, who never mean either to deliver shares or to accept shares, get their differences, and their contracts are all over. But then the object of the custom is, that if there happen to be a real seller and a real purchaser they may be brought together.

Now what is the ticket? The ticket is issued by the purchaser's broker, and it appears to me, the broker who issues that ticket professes to be the agent of the man whose name is on the ticket. I cannot agree with Mr. Justice *Blackburn* that he offers to make a contract on his own account. It appears to me that what he does is this: he represents that the person whose name is on the ticket is his principal; that he has authority to bind him; that he is a person capable of accepting the shares; and that he, the broker, has authority to accept the transfer on his account so as to bind him. It appears to me that he makes that representation, and if that representation is true, if the person whose name is on the ticket has really authorized the broker to put his name on it, then it appears to me the person whose name is on the ticket offers to make this contract: He says, in effect, to any person to whom this ticket may come in the course of the ordinary business of the *Stock Exchange*, if he is a person who has got the shares to transfer: "You may make out the transfer of the shares and insert my name as the purchaser, and when the transfer is brought to my broker, whose name is on the ticket, he will on my account pay the purchase-money which I have agreed to pay, not to the person from whom I have purchased, but to the broker who brings the transfer, and I will engage to accept that transfer." It appears to me that when the broker of the original vendor, having received the ticket, fills in the transfer and gets his principal to execute the transfer to the person whose name is on the ticket, and then takes it to the broker whose name is on the ticket, and he accepts it and pays the purchase-money, then a perfect privity of contract is established between the vendor and the ultimate purchaser. Then the contract of the jobber, that instead of himself he will find another purchaser, is fulfilled. But the broker who issues the ticket is not liable on the contract as a purchaser at all. I do not at all mean to say that he is not liable; on the contrary, if the representation he makes is untrue, if the person whose name is on the ticket has really never authorized him to put his name there, or is a person who is incapable of taking shares, being an infant, then it appears to me the broker who issues the ticket makes an untrue representation, and whether he makes it fraudulently or not I apprehend that, according to the rules of this Court, if anybody to whom that ticket passes in the ordinary course of business alters his position, and incurs pecuniary loss from believing and trusting in the truth of that statement, the broker would be liable to make good his representation. It may be, if the broker had an ultimate principal who put somebody else's name on the ticket, that in this Court that ultimate principal would be liable; and indeed it has been so held. But I cannot see that there is any privity of contract by the original vendor with the broker who issued the ticket, or indeed with the principal of that broker, unless his name is put on the ticket, because it appears to me that

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the only contracts are the original contract between the vendor and the jobber, and then, by the usage of the *Stock Exchange*, the further contract that in lieu and instead of the jobber the vendor will accept the name of the person who is on the ticket. But it appears to me that all that is on the assumption that there is a real purchaser or a real transferee. I make a distinction between the terms, because in *Maxted* v. *Paine* (2nd action) (1) the Judges came to the conclusion (and I do not dispute the correctness of that decision) that the person whose name is on the ticket need not be a person who has really purchased the shares; but the person who has purchased the shares is entitled to put the shares in the name of somebody else, and that in that case there would be a compliance with the rules of the *Stock Exchange*. That I would not at all dispute. But certainly it has never been held yet (unless it was so held in the case before the Master of the Rolls) that the jobber was discharged unless he produced somebody else to take his place.

Now there is some evidence in this case which I think is not immaterial to refer to, which is given by the Defendant and some of his witnesses respecting the present usage in the *Stock Exchange*, and illustrates what appears to be said by Mr. Justice *Blackburn*, that as all the contracts are really with the members of the *Stock Exchange*, if they are discharged their principals must be discharged, because the real contracts are made with them. They give this evidence because one witness on behalf of the Plaintiff gives evidence that on one occasion, after the whole of the transaction had been completed, the committee of the *Stock Exchange* made the ultimate broker personally responsible. Now the evidence of the Defendant is to this effect: "The decision of the committee directing the said broker to indemnify the said *George Copeland Capper* was in accordance with the rules and usages of the *Stock Exchange*, it having been the practice of the committee in cases where shares had been transferred into the name of a minor or that of some other person to whom reasonable objection had been established, to hold that the member who issued the ticket with such name should be liable to indemnify the transferor from the consequences thereof; but since the recent decisions of this honourable

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(1) Law Rep. 6 Ex. 132.

Court holding the real buyer liable to indemnify the transferor they have ceased to hold the broker responsible in such cases, and have left the transferor to his legal remedies against the transferee or the real buyer." Now, observe what the committee have done since they found that this Court will hold either the transferee or the person who put the broker in motion responsible; they have made it a rule of the *Stock Exchange* that the broker of the ultimate purchaser shall not be liable, although he has put on the ticket the name of an infant or the name of a person incapable of taking shares. According to the doctrine of Mr. Justice *Blackburn*, the broker being discharged, the employer of the broker would be discharged also.

Can they really make such rules as that? According to their rules nobody is liable. The broker of the original vendor cannot be made liable for his carelessness in not finding out that the name on the ticket was that of an infant, and the jobber cannot be made liable for the breach of his contract, and the broker who issues the ticket cannot be made liable unless he has been guilty of actual fraud, and then they say that outside persons are to sue each other.

We must look to the rules as they existed before these questions arose, and it appears to me that the fair and reasonable construction of them is, that the jobber made the contract for the purchaser, but that he made it with the condition that inasmuch as he did not want to take the shares himself, if by means of the rule of the *Stock Exchange* he produced another person who did accept the transfer, then he was discharged. If it turns out unfortunately that the person whose name is put on the ticket, and to whom the transfer is made, is a person who has given no authority to take the transfer, and who is not a purchaser, then it appears to me the jobber has not performed his contract, and therefore is not discharged.

Now there is one passage which I wish to read, in addition to what has been read by the Lord Justice, simply to shew that the other Judges did not concur with Mr. Justice *Blackburn*, and that in the decision of *Maxted* v. *Paine* (2nd action) (1) they have not altered the principle upon which they have hitherto proceeded.

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(1) Law Rep. 6 Ex. 132.

After Mr. Justice *Blackburn* had delivered his judgment in that case, Lord Chief Justice *Cockburn* gave his judgment, and he put it entirely on the ground that the case could not be distinguished from *Grissell* v. *Bristowe* (1). He says (2): "If this be so, the case is brought directly within the decision in *Grissell* v. *Bristowe.* In that case the Court held that while, according to the reasonable construction of the usage of the *Stock Exchange*, the first buyer, in availing himself of the right afforded by the usage, and therefore implied by and comprehended within the terms of the original contract, of substituting another buyer for himself, was bound to give the name of a person willing and able to fulfil the contract; yet if the seller, instead of objecting to the person so proposed, accepted such person as the buyer, and proceeded to transfer the shares to him, he took him for better or worse, and in so doing released the original buyer from all further liability."

In my opinion that is a true description of the contract. If the person whose name is on the ticket is willing and able to fulfil the contract, then, as soon as the transfer is made to him, the jobber is discharged. But in the present case, there being no person willing and able to fulfil the contract, and the person whose name was on the ticket having given no authority to the jobber to put his name there, the jobber is not discharged.

SIR W. M. JAMES, L.J.:—

I desire to add that our decision in this case will, in my judgment, do no injustice. The vendor, who is not a member of the *Stock Exchange*, has his remedy against his purchaser, the jobber; and the jobber, having been misled by somebody else on the *Stock Exchange*, and so left liable, will have such relief from that domestic tribunal as, according to the rules of that body, he is entitled to have against the member who has really caused the mischief; and possibly they may think it right to alter their rules accordingly.

Solicitor for the Plaintiff: Mr. *W. A. Crump*.
Solicitors for the Defendants: Messrs. *Morley & Shirreff*.

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(1) Law Rep. 4 C. P. 36.

(2) Law Rep. 6 Ex. 183.

L. JJ.
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11 Ch D 64]

In re SAVIN.

Mortgagee—Inspectorship Deed—Bankruptcy—Subsequent Interest—Valuation.

A debtor executed an inspectorship deed under the *Bankruptcy Act*, 1861. A Judge in Chancery, acting under the *Liquidation Act*, 1868, ascertained the value of the securities held by the secured creditors, which value the creditors were to take in discharge of their debts, and to be allowed to prove for the deficiency:—

Held, that the rule in bankruptcy prevailed, and that the value so ascertained must go in reduction of the principal and interest due to the secured creditors at the date of the inspectorship deed, and to be proved for by the creditors, and could not be applied by the creditors in the first place towards payment of interest accrued on their debts since the date of the inspectorship.

Decision of *Bacon*, V.C., reversed.

THOMAS SAVIN, who had been engaged in constructing railways and other works to a very great extent, on the 17th of February, 1866, executed, under the provisions of the *Bankruptcy Act*, 1861, a deed of inspectorship, by which he covenanted to carry on his business and to get in his estate for the benefit of his creditors, under the control and inspection of three inspectors therein named. The deed further provided that his estate should be administered in accordance with the principles of the then bankrupt law in *England*, or as near thereto as circumstances would permit.

In pursuance of the provisions of the *Liquidation Act*, 1868 (31 & 32 Vict. c. 68), the inspectors under this deed proposed, before the Vice-Chancellor *James*, a scheme for the valuation, division, and disposition of certain assets of the debtor. This scheme, amongst other things, provided that the assets of the debtor should be valued by the Judge in Chambers, as holding and not as selling securities; that this valuation should be conclusive for all purposes connected with the scheme, and that the secured creditors should take the securities held by them respectively in or towards discharge of their debts, and should be admitted as creditors on the general estate for their balances, if any.

The scheme was confirmed by the Court, and the Chief Clerk, proceeding under it, made his certificate, dated the 9th of May, 1872, by which he certified that he had been attended by the solicitors of different parties (amongst whom were the solicitors of the *Joint Stock Discount Company*), and that the assets had been valued according to the scheme. Amongst the securities so valued were shares in the *Brecon and Merthyr Tydfil Junction Railway Company*, and in several other railway companies. The *Joint Stock Discount Company*, to whom *Thomas Savin* was indebted at the date of the deed of inspectorship in the sum of £160,000 principal and £83 interest, held a great number of shares in these railway companies by way of security for the debt due from *Thomas Savin* to them. Part of these shares had since been sold by the *Discount Company*, and the *Discount Company* now claimed by summons to be allowed to apply the sum received by them from the sales, and also the ascertained value of the securities so held by them, first, in satisfaction of the interest which had accrued on the £160,000 since the date of the inspectorship deed, and, secondly, in part payment of the £160,083.

The Vice-Chancellor *Bacon* held that the *Discount Company* might so apply their securities (1), and the inspectors appealed.

(1) 1872. July 26.

SIR JAMES BACON, V.C.:—

In this case the rule in bankruptcy must unquestionably prevail, and the creditor can have no more than he would have if it were the most formal bankruptcy. The creditor is a mortgagee, that is to say, he holds property which was the bankrupt's, and is now the creditor's, as security for his debt, and it is a debt which carries interest. If the inspectors or assignees in bankruptcy desire to take these securities out of the creditor's hands they can only do so upon the terms applicable to all mortgages, that is, by paying principal, interest, and costs.

The law in bankruptcy does not take away from the mortgagee any of his rights. The rule as to interest stopping at the date of the fiat applies only to the bankrupt's estate distributed in the bankruptcy, and does not affect the rights of a mortgagee. The terms of Lord *Loughborough's* order (8th of March, 1794), and of the orders of the Court which were made in the cases of equitable mortgages, to which Lord *Loughborough's* order did not apply, were always the same.

If this was an ordinary mortgage, and the assignees desired to redeem it for the benefit of the bankrupt's estate, they could only do so upon the terms of paying principal, interest, and costs to the mortgagee.

In bankruptcy the mortgagee may come to the Court either as legal or as equitable mortgagee, and have his security sold and turned into money; and the orders provide that upon the sale there shall be deducted from the proceeds of the sale the assignee's costs of the sale, that there shall be ascer-

Mr. *Kay*, Q.C., and Mr. *Westlake*, for the inspectors:—

This case is governed by the same rules as a bankruptcy, and it has been long settled that interest ceases at the date of the bankruptcy, and that a secured creditor cannot include interest in the deficiency for which he can prove. *Ex parte Wardell* (1); *Ex*

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tained what is due for principal, interest, and costs, and that that amount, whatever it is, shall be paid to the mortgagee, and if there is a deficiency, he shall be at liberty to prove under the bankruptcy for the deficiency. The rule in bankruptcy as to interest has been found fault with, but it is perfectly rational and just. A mortgagee is in the same plight as a judgment creditor. Both of them are by law entitled to interest, though neither of them can have interest out of the bankrupt's estate. But the law never was that a mortgagee could not obtain his interest out of his pledge. He is entitled to have his pledge realised, and out of that to be paid the principal, interest, and costs; and if that is not enough, he is entitled to prove for the deficiency. If the pledge will pay the principal, interest, and costs, the creditor takes them at once; but if not, then he is entitled to have his principal, interest, and costs paid out of the pledge, and to prove for the difference.

Now it is said that *Ex parte Lubbock* (9 Jur. (N.S.) 854) introduced a different rule. I do not think it did. It was a complicated case. There had been several mortgages, and some of them were to be realised out of the bankruptcy. The case of *Ex parte Kensington* (2 Mont. & A. 300) was one of very special circumstances, and although there are in the judgment general allusions to what is called a rule in bankruptcy, the reason for deciding that case was that the Plaintiff's estate had, in the interest of the estate and at the instance of the assignees, derived a benefit from the postponement of the sale. That does not touch the principle which, as I think, must govern this and all other cases in bankruptcy: the mortgagee is entitled to be paid his principal, interest, and costs out of his security, and then to prove against the estate for the deficiency, not of that aggregate amount, but of the deficiency in his capital debt. He may pay himself the interest as well as he can out of the proceeds of the pledge when the account comes to be taken, and all that remains must be the debt minus the interest which would have been satisfied, and he may prove for all that remains of his debt. That I take to be the settled rule in bankruptcy; and I do not think that any of the cases, properly considered, will be found to infringe that principle. The terms of Rule 55 of 19th October, 1852, under the Act of Parliament which regulates this particular case, and also the Rule (Gen. Rule 78) made under the present law in bankruptcy, all proceed upon the same footing. The debt and the interest are two totally distinct and separate things. When the value of the property pledged is ascertained the interest may be deducted by the holder of the pledge, for the property is his, and is applicable to the payment of the debt, though he cannot prove it in bankruptcy. That being deducted, what remains of the value of the pledge unsatisfied by the application of the proceeds, the company may prove for in the liquidation.

(1) 1 Cooke, B. L. 195.

parte Ramsbottom (1); *Ex parte Badger* (2); *Ex parte Penfold* (3). *Ex parte Kensington* (4) is an exception which proves the rule. The rule has been repeated in the same words from the time of Lord *Loughborough* to the present time, and the same interpretation has always been put upon it. *Ex parte Johnson* (5) and *Ex parte Lubbock* (6) are in our favour.

Mr. *De Gex*, Q.C., and Mr. *Jackson*, for the *Discount Company*:—

Ex parte Lubbock was a complicated case, and as to this point there is only a dictum. The order in *Ex parte Badger* is clearly wrong, and it is said that no such order can be found. At all events, the circumstances of this case bring it within *Ex parte Kensington*. The rule in bankruptcy is very iniquitous, and must not be extended to inspectorships: *Kellock's Case* (7). Why may the creditor not apply this money towards payment of the interest which is due on his security? But for the interference of the Court in this case we should have retained our securities, and we could not have been redeemed without receiving principal, interest, and costs. Under this scheme we were obliged to have our securities valued, but we ought not thereby to be deprived of our unquestionable rights. It is said that this rule has been established, but in none of the orders made at different times, from the time of Lord *Loughborough*, has it ever been expressed.

Sir W. M. James, L.J.:—

I am of opinion that the Vice-Chancellor, in making this order, omitted to give sufficient weight to a series of decisions which he does not appear to have noticed in his judgment. What was said by Lord *Westbury* in *Ex parte Lubbock* appears to me not in any way open to the observation that it was in the nature of an *obiter dictum* which fell from the Lord Chancellor in dealing with a very complicated state of circumstances. The decision in that case is plain and distinct, and is solely and exclusively addressed to the

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(1) 2 Mont. & A. 79; 4 Dea. & Ch. 198.

(2) 4 Ves. 165.

(3) 4 De G. & Sm. 282.

(4) 2 Mont. & A. 300; 1 Deac. 58.

(5) 3 D. M. & G. 218.

(6) 9 Jur. (N.S.) 854.

(7) Law Rep. 3 Ch. 769.

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point now before us. It is true that his Lordship's words are confined to an equitable mortgage, which was the case before him; but there appears to be no distinction between a legal and an equitable mortgage in the case of a proof in bankruptcy by a creditor—already secured by way of mortgage—and the decision is, that the proof is to be so dealt with as not to allow him to prove for interest subsequent to the bankruptcy.

There is a general rule in bankruptcy—whether a right and a reasonable rule or not—that there is to be no proof in bankruptcy for interest subsequent to the bankruptcy. There was also a rule in bankruptcy, that a creditor holding a mortgage security is to make up his mind whether he will rely upon his security or give it up and come in and prove with the other creditors. This rule was relaxed in favour of the creditor by a rule that his security might be sold, and then he was to apply the realised proceeds in payment of his debt. On this rule a judicial decision was made nearly eighty years ago, that the proceeds of the sale were, in case of deficiency, to be applied in payment of principal and interest up to the date of the bankruptcy, and up to the date of the bankruptcy only; and then the creditor was to prove for the residue of his debt, which, of course did not include any interest subsequent to the date of the bankruptcy.

That rule has been repeated in the very same terms by every writer on the subject, and by every Judge, with the exception perhaps of Mr. Commissioner *Montagu's* note to *Ex parte Ramsbottom* (1). It seems to have been considered as the established rule in bankruptcy, and so it was laid down by Lord *Westbury* in the case already referred to.

That being so, it appears to me that we cannot go into any reasoning whether the rule is unjust or unreasonable, or alter the rule, or say that the rule is only to be applied in the same cases in which it has been applied, or that the rule is not quite consistent with the existing state of circumstances.

I believe, however, that if the question now arose for the first time I should agree with the rule, seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

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(1) 2 Mont. & A. p. 83, App. A.

But then it is said that the rule in bankruptcy does not apply to this particular case, because this is a liquidation under an Act of Parliament. It is said that in this particular case the creditor did not come for the assistance of the Court, and was exactly in the position of any other mortgage creditor who chose, according to the usual expression, to sit upon his securities. Of course a man may sit upon his securities, and wait until he is redeemed or foreclosed, and there he remains until the assets are distributed among the creditors. But in this particular case the very ground of the application before us is that the *Discount Company* is actually coming here for the assistance of the Court. The *Discount Company* must be considered to have been a party to the scheme, which does not seem to have been opposed. In fact it was said at the bar that the company appeared and assented. I do not know how far that is material, but it is clear that this scheme never could have been adopted by the Court unless it had been generally approved of by the secured creditors. The scheme then provided that the creditors should take the securities at a valuation; and if the *Discount Company* chose to do that, instead of availing themselves of their right to foreclose, they have obtained the advantage of taking the assets at a valuation, and then proving for the difference.

It seems to me that the valuation must be taken exactly in the same way and upon the same principles as are applied in ordinary bankruptcies—that is to say, the creditor must prove for the difference in exactly the same way as he could prove for the difference in bankruptcy if he had realised his security, either by a suit in Chancery or by a sale, and then had come in to prove. In that position, according to my view of the established cases, he would have been prevented from either directly or indirectly proving for the interest accrued subsequently to the bankruptcy.

That being so, it appears to me that it was the intention, and the express intention, of the Act of Parliament and of the scheme, that each creditor should be dealt with in exactly the same way as a creditor would be dealt with in an ordinary bankruptcy after he had come in for the purpose of realising the security, and that each creditor will be entitled to prove for the deficiency, but will not be allowed to take into account the interest subsequent to the bankruptcy.

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Having arrived at that conclusion, I am of opinion that the order of the Vice-Chancellor ought to be discharged and the summons dismissed.

SIR G. MELLISH, L.J., concurred.

Solicitors for the *Discount Company*: Messrs. *Mackenzie, Trinder, & Co.*

Solicitors for the Inspectors: Messrs. *Ashurst, Morris, & Co.*

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In re HOPE.

Uncertificated Solicitor—Costs.

A person who has been ordered to pay costs cannot, on the ground that the solicitor on the other side was uncertificated, refuse to pay the costs.

Order of the Master of the Rolls affirmed.

IN this case *George Hawkins* and others had obtained an order on petition of course that *Benjamin Hope*, a solicitor, should deliver his bill of costs to be taxed. Mr. *Hope* moved, before the Master of the Rolls, to discharge this order, and the motion was dismissed with costs. The Respondents' costs of this motion were taxed, Mr. *Hope* objecting, as to part of them, that the solicitor of the Petitioners had no certificate; but his objection was overruled by Mr. *Drew*, the Taxing Master. Mr. *Hope* then took out a summons that the Master should review the taxation. It was admitted that the solicitor had not taken out his certificate in time.

The Master of the Rolls made no order on the summons except that Mr. *Hope* should pay the costs thereof.

Mr. *Hope* appealed.

Mr. *Hope*, in person in support of the appeal, said that under 6 & 7 Vict. c. 73, s. 26, an uncertificated attorney could not recover any costs: *In re Jones* (1). There was no proof that the client had paid the costs to the solicitor.

Mr. *Daniel*, for the Petitioners.

(1) Law Rep. 9 Eq. 63.

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Their Lordships thought that the case was governed by the decision in *In re Jones* (1); and both the Taxing Master and the Master of the Rolls had been of opinion that the costs must be paid. The Act said that no person who as an attorney or solicitor should carry on any action or suit without having previously obtained a stamped certificate, should be capable of maintaining any action for the recovery of any fee, reward, or disbursement; but there was nothing to prevent the client from paying the attorney, and the want of a certificate could not create any impropriety on the part of the client in doing so. No doubt he might have refused to pay the costs incurred, but he was bound in honour to pay them, and if he had done so, and there was nothing to shew that he had not, he had a right to recover them from the person who had been ordered to pay. The appeal must be dismissed with costs.

Solicitors: Mr. *B. Hope;* Mr. *T. H. Strangways.*

ATTORNEY-GENERAL *v.* GREAT WESTERN RAILWAY COMPANY.

[1872 A. 70.]

L. JJ.
1872
July 31.

4 ChD 742
11 ChD 483

*Railway Company—Board of Trade—Notice of Opening Railway—*5 & 6 *Vict. c.* 55, *s.* 4.

Under the powers of certain Acts of Parliament junctions were made between the main line of a railway company and two branch lines of railway on opposite sides of the main line; so that trains coming from one of the branch lines ran for some distance along the main line and then passed on to the other branch line. Some years afterwards the company laid down a line of railway parallel to their main line for about a mile, and substituted for one of the original junctions a new junction, nearly opposite to the other original junction, so as to form between the two branch lines a level crossing over the main line. The company also made two new stations on this new line:—

Held (affirming the decision of *Wickens*, V.C.), that the new line was a railway or portion of railway which, under 5 & 6 Vict. c. 55, s. 4, could not be opened without previous notice to the Board of Trade.

By the *Hammersmith and City Railway Act*, 1861, a company was incorporated with power to construct, among other things, a railway commencing by a junction with the *Great Western Railway* (which was then and had for many years been constructed) near *Green Lane Bridge*, a point distant about rather more than a mile from the *Paddington Station* of the *Great Western Railway*, and the point of junction was shewn on the plans.

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(1) Law Rep. 9 Eq. 63.

The railway was accordingly constructed with the junction near *Green Lane Bridge*, and notice of the company's intention to open the line for public traffic was duly given to the Board of Trade, pursuant to 5 & 6 Vict. c. 55, s. 4. The opening of this line was, after inspection, duly sanctioned on the 10th of June, 1864, and the working thereof was commenced shortly afterwards.

By the *Metropolitan Railway Act*, 1854, power was given to the *Metropolitan Railway Company* to construct (amongst other railways) a branch line, which was to commence at a point in *Praed Street* and to terminate by a junction with the line of the *Great Western Railway* in or near their new station at *Paddington*, which was then in course of construction; but the point of junction was not shewn on the plans. In the year 1862 the *Metropolitan Railway Company* had completed the construction of that branch line, with a station at its western extremity, known as *Bishop's Road Station*, close to the *Paddington Station*.

The *Metropolitan Railway Company* gave due notice of their intention to open this branch line for public traffic, and the Board of Trade after inspection sanctioned the opening, which took place in January, 1863. About this time the junction between the *Metropolitan Railway* and the *Great Western Railway*, beyond *Bishop's Road Station* and near *Westbourne Bridge*, had been constructed. There was a dispute whether this was done before or after the inspection; and no formal sanction to the junction appeared to have been given.

By means of these junctions the trains of the *Metropolitan Railway* came on the line of the *Great Western Railway* near *Westbourne Bridge*, and running for some distance along the line of the *Great Western Railway*, ran on to the line of the *Hammersmith Railway* near *Green Lane Bridge*.

Some time prior to October, 1871, the *Great Western Railway Company* constructed a double line of railway over their own land, running parallel to the main line of the *Great Western Rail-*

way, in continuation of the line of the *Hammersmith Railway*, from near *Green Lane Bridge* to a point near *Westbourne Bridge*, and formed a new junction there (in substitution for the old *Green Lane* junction, which they removed), nearly opposite to the junction with the *Metropolitan Railway*, so that the pair of junctions constituted a level crossing over the main line of the *Great Western Railway*, by means of which the traffic from the *Hammersmith* to the *Metropolitan Line* was worked by the *Metropolitan Railway*, with the permission of the *Great Western Company*.

The *Great Western Railway Company* also made two new stations on this new line of railway, called *Westbourne Park Station* and *Royal Oak Station*.

The new line of railway, and the new stations, and the new junctions were never submitted for inspection, and no notice in respect thereof was ever given to the Board of Trade in pursuance of 5 & 6 Vict. c. 55 (1), and the use of them was never sanctioned by the Board of Trade.

The Board of Trade, after some correspondence with the *Great Western Railway Company*, proceeding under 7 & 8 Vict. c. 85, s. 17, on the 17th of May, 1872, certified to the Attorney-General that the provisions of 5 & 6 Vict. c. 55, had not been complied with on the part of the *Great Western Railway Company*, inasmuch as they had continued within a year, and were still continuing, to

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(1) By 5 & 6 Vict. c. 55, s. 4, it was enacted, that no railway or portion of any railway shall be opened for public conveyance of passengers until one calendar month after notice in writing of the intention of opening the same shall have been given by the company to whom such railway shall belong to the Lords of the Committee of the Privy Council appointed for Trade, and until ten days after notice in writing shall have been given by the company to the Lords of the Committee of the time when the said railway, or portion of railway, will be, in their opinion, sufficiently completed for the safe conveyance of passengers and ready for inspection.

By s. 6, it was enacted that, if the officer appointed to inspect any such railway or portion of railway should, after inspection thereof, report in writing that in his opinion the opening of the same would be attended with danger to the public using the same, by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working such railway, together with the grounds of such opinion, it should be lawful for the Lords of the Committee to order and direct the company to postpone such opening for any period not exceeding one calendar month.

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use the new portion of railway for the public conveyance of passengers without any notice of their intention of opening the same being given to the Board of Trade; and that it would be for the public advantage that the company should be restrained from using the said portion of railway.

On the 12th of July, 1872, an information was filed by the Attorney-General against the *Great Western Railway Company* and the secretary thereof, stating that the traffic where the railways crossed was a source of continual danger, and that that danger had been increased by the alteration of the mode of crossing; and praying a declaration that, by using the new portion of railway without notice to the Board of Trade, the company had not complied with the provisions of 5 & 6 Vict. c. 55; and praying an injunction against the use of the new piece of railway.

Evidence was given in support of the information that the crossing was dangerous, and that two accidents had already happened there. The Defendants produced evidence that the present crossing was much safer than the former crossing; that the accidents were not attributable to the crossing; that they had spent a very large sum of money in making the alterations; and that alterations in sidings and stations had continually been made without giving notice to the Board of Trade.

A motion was made on behalf of the informant for an injunction, which was granted by the Vice-Chancellor *Wickens* (1).

(1) 1872. July 26.

SIR JOHN WICKENS, V.C.:—

Nearly all the arguments in opposition to this motion are covered by the case of *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (2 W. R. 332). That was the first decision on the subject, but it has always been considered as laying down the law correctly.

It is said, however, that the unsanctioned alteration is an improvement, and tends to the greater safety and advantage of the public; but, in my opinion, that is a matter with which we have nothing to do. Then it is urged that the *Railways Regulation Act*, 1871 (34 & 35 Vict. c. 78, s. 5), which purported to extend the provisions of the Act 5 & 6 Vict. c. 55, s. 4, must be taken as shewing that the works now in question, which are certainly among those mentioned in the latter Act, are not within the former Act. This argument, having regard to the case I have already mentioned, is entitled to no attention; and I have no doubt whatever that these works are within the former Act. Then it is further said, that the Board of Trade, by omitting to object to the alterations of the junction and construction of the lines since 1864 have waived their

The company appealed.

Sir *J. Karslake*, Q.C., Mr. *Dickinson*, Q.C. (Mr. *Speed* and Mr. *H. A. Giffard* with them), for the company:—

It is the avowed intention of the Board of Trade to compel us to make a bridge or tunnel, although Parliament has expressly authorized the lines to cross at a level, and has taken away the authority of the Board of Trade on that subject. However dangerous the inspector may consider a level crossing to be, he cannot stop it if it is authorized by Parliament and is properly constructed. We have merely altered the position of the junction. We had a right to cross at a level, and we have merely altered the mode of doing it; thereby, in fact, making the crossing much less dangerous. The company have merely put upon their own land additional lines of railway for their own convenience, and it is impossible to say that in all such alterations the Board of Trade is to be consulted. The Board of Trade does not pretend to say that the works are incomplete or insufficient. In the case of *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (1), on which the Vice-Chancellor relied, the inspector had reported one of the lines incomplete and unsafe. Moreover, it is impossible for us to make either a tunnel or a bridge without further powers from Parliament. The inconvenience of stopping the traffic by injunction will be enormous.

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right to interfere. But the Board of Trade is a public body appointed to protect the public, and it is difficult to see how their abstention from action in a particular case can be held to be a waiver of the right to interfere in a subsequent and different case. Lastly, it is said that the Attorney-General ought to have moved more promptly, and they ought not now to be allowed to have an interlocutory injunction. This objection fails on the facts, even if the Attorney-General, moving *ex officio*, were subject to the same consideration as regards promptitude which affects an individual seeking to enforce his personal rights. The Court is always unwilling to decide on a motion for an injunction the question to be decided on the hearing; but where, as in this case, the materials are not susceptible of variation or addition, and when the final and competent authorities declare that the continuance of the thing complained of puts the public in peril, I am bound, as I entertain no doubt as to the right, to grant the injunction at once. To give the company time to make the necessary arrangements, the injunction is not to come into operation before the 1st of October next, though, perhaps, I may be doing wrong in granting so long a delay.

(1) 2 W. R. 330.

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The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Hemming*, in support of the information, were not called upon.

Sir W. M. James, L.J. :—

It appears to me that we cannot alter the order made by the Vice-Chancellor, for this reason: The Act 5 & 6 Vict. c. 55, s. 4, says that a company must not open a line of railway, or a portion of a line of railway, without giving the proper notice to the Board of Trade, so that it may be duly inspected. That is what the Act of Parliament has said, and the Board of Trade say that they are bound to exercise their powers for the protection of the public. The only question upon that point is, whether this is a railway, or a portion of a railway, which has been opened without such notice. I must confess that I cannot bring my mind to doubt that this really is a portion of a railway—that is to say, it is a line of railway between half a mile and a mile long, over which passenger trains are to run, and as to which it is as essential for the Board of Trade to see, for the protection of the public, that the works are complete and safe as it would be for them to inquire into anything else. It is not because it happens to be upon the land of the *Great Western Railway Company*, and parallel with some other line of the company, that it may not be the source of great danger.

Then as to the time. The company will have plenty of time between this and the 1st of October to give the notice, and there will be a month further after the notice. Then, of course, it will be for the officer appointed by the Board of Trade to inspect the railway, and it will be for him upon his responsibility to report; and, of course, the Court must suppose that he will report honestly, truly, and fairly, whether in his opinion the opening will be attended with danger to the public using the same, by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working the railway. He will have to report that, and the ground of his opinion, to the Board of Trade, and if he does not, within the proper time, make such a report, or if his report is one which the railway company think they can bring under the notice of the Court, shewing that there is no danger, then there will be liberty for them to apply to dissolve the injunction.

I think they ought to have liberty to apply to the Vacation Judge in case of no report being made, or after any report made by the proper officer appointed by the Board of Trade. In the meantime, the injunction must stand, merely giving them the time they have under the order of the Vice-Chancellor in which to give the notice to the Board of Trade.

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Sir G. Mellish, L.J., concurred.

Solicitors for the Informant: Messrs. *Raven & Bradley.*
Solicitors for the Defendants: Messrs. *Young, Maples, & Co.*

JONES *v.* FROST.

[1867 J. 136.]

In re FIDDEY (a Solicitor).

L. JJ.
1872
July 29.

*Solicitor's Lien—Charge on Property recovered—*23 *&* 24 *Vict. c.* 127, *s.* 28—*Useless Suit—Suit no longer pending—Recital in Deed by Married Woman—Estoppel.*

9 Ch 659
7 Ch D 319
321
498

A solicitor is entitled to a charge for his costs on property the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance be entirely valueless, provided it formed a cloud upon the title.

It is no objection to an application for such a charge that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property has been sold before the application of the solicitor.

Semble, a married woman is bound by estoppel by a recital in a deed duly executed and acknowledged by her, in the same manner as if she were a *feme sole.*

Order of the Master of the Rolls affirmed.

THIS was an appeal from an order of the Master of the Rolls.

William Blackman, by his will, dated the 18th of December, 1822, devised a freehold messuage and premises in the city of *London* to trustees upon trust to pay the income to his wife, *Martha Blackman* (afterwards *Martha Wright*), during her life, and after her death upon trust to pay the income to his daughter, *Ellen Watts Blackman,* during her life for her separate use, and after her death in trust for all the children of his said daughter as tenants in common in fee; and in default of children he declared

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that the hereditaments should be held in trust for his son, *William Blackman* the younger, in fee. The testator died in November, 1828.

Ellen Watts Blackman married *G. Bradbury*, but had no children.

W. Blackman the younger had one child only, namely, *Jane Nottingham Jones*, the wife of *Thomas Jones*.

On the 27th of November, 1864, while *Martha Wright*, *Ellen Watts Bradbury*, and *W. Blackman* the younger, were still alive, Mr. and Mrs. *Jones* executed a deed, which recited erroneously that *W. Blackman* the younger was dead, and thereby, in consideration of £25, they conveyed to the Defendant *W. Frost* "all the estate and interest of the said *Jane Nottingham Jones* and of the said *T. Jones* in her right in all the property to which, under the trusts of the will of *W. Blackman* the elder, the said *Jane Nottingham Jones*, as the only child of the said *W. Blackman* the younger, deceased, was or would become entitled in possession or in remainder expectant or contingent upon the death of the said *Martha Wright*, and upon the death of the said *Ellen Watts Bradbury* without issue."

This indenture was duly acknowledged by Mrs. *Jones*.

W. Blackman the younger died on the 12th of March, 1867, intestate.

On the 31st of December, 1867, Mr. and Mrs. *Jones* filed this bill in the Rolls Court against *Frost* for the purpose of setting aside the sale of Mrs. *Jones*' expectant interest. Mr. *H. W. Bull* was the solicitor employed by the Plaintiffs in filing the bill. On the 12th of June, 1868, Mr. *Fiddey* was substituted for Mr. *Bull* as solicitor for the Plaintiffs; but on the 15th of August, 1868, Mr. *Bull* was restored as solicitor in Mr. *Fiddey's* place. On the 20th of December, 1868, *Frost* put in his answer, in which he submitted to reconvey to the Plaintiffs their interest in the property on being repaid the sum of £25.

On the 26th of February, 1869, Mr. *Bull* was again removed and Mr. *Fiddey* was reinstated as solicitor for the Plaintiffs. On the 16th of August, 1869, Mr. and Mrs. *Jones* conveyed their reversionary interest for its full value to *S. C. Martin*, who again sold it to *J. L. Heinrich*.

On the 27th of October, 1869, Messrs. *Wilkinson & Howlett*,

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Heinrich's solicitors, were substituted for Mr. *Fiddey* as solicitors for the Plaintiffs in the suit.

In June, 1870, the bill in *Jones* v. *Frost* was dismissed by consent of all parties, and the property reconveyed by *Frost*.

In November, 1870, the suit of *Heinrich* v. *Sutton* was commenced by *Heinrich* against some other persons claiming interest in the property.

Mr. *Fiddey* had his bill of costs in *Jones* v. *Frost* taxed at £120, and took out a summons in the Chamber of the Master of the Rolls, asking for a charge for his costs upon the property recovered in that suit, under the 28th section of the *Solicitors Act*, 1860 (23 & 24 Vict. c. 127). The Chief Clerk refused the application on the ground, as was stated, that the summons was not intituled "*In re Fiddey* (*a Solicitor*)," and that the suit of *Jones* v. *Frost* no longer existed; and the summons was never adjourned into Court.

Mr. *Fiddey* then took out a similar summons before Vice-Chancellor *Malins* in the suit of *Heinrich* v. *Sutton*, who made the order asked for; but his decision was reversed by the Lords Justices on the ground that the application ought to have been made in the branch of the Court to which the suit of *Jones* v. *Frost* had been attached (1).

Mr. *Fiddey* then presented this Petition to the Master of the Rolls, which was served upon Mr. and Mrs. *Jones* and upon *Heinrich*, stating the circumstances, and praying for a declaration that the Petitioner was entitled to a charge upon the reversionary estate of the Plaintiffs, Mr. and Mrs. *Jones*, for the amount of his taxed costs with interest. The Master of the Rolls made the order prayed for (a) and from this decision *Heinrich* appealed.

Mr. *De Gex*, Q.C., and Mr. *Ramadge*, for the Appellant:—

The order is erroneous for several reasons. In the first place, the 28th section of the *Solicitors Act*, 1860 (23 & 24 Vict. c. 127), under which this application is made, gives power to make the order "to the Court or Judge before whom any such suit, matter, or proceeding has been heard or shall be depending." The suit of *Jones* v. *Frost* never was heard and is not now depending, for it has been dismissed; therefore the Court has no jurisdiction.

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(1) See *Heinrich* v. *Sutton*, Law Rep. 6 Ch. 865.

(a) See WN (1872) 149

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In the second place, nothing at all was recovered or preserved by means of that suit. For at the time when the deed was executed Mrs. *Jones* had no interest but a mere possibility, which she could not convey. If she had been a *feme sole* she might have been bound by way of estoppel by the statement in the deed that her father was dead, but there is no authority for holding a married woman bound by estoppel in such a case. She did not even profess to convey the estate, but only her "interest" in it, which was nothing. The suit and subsequent reconveyance were therefore entirely useless.

[The LORD JUSTICE JAMES referred to *Crofts* v. *Middleton* (1).]

Again, Mr. *Fiddey* was not the solicitor at the time when the bill was filed, nor when the suit was dismissed. He cannot be said to have recovered or preserved anything.

Mr. *Southgate*, Q.C., and Mr. *Cecil Dale*, for the Petitioner, were not called on.

Mr. *Pace*, for Mr. and Mrs. *Jones*.

SIR W. M. JAMES, L.J. :—

In this case several points have been raised and argued which have no real bearing on the question at issue. A solicitor asks for a declaration that he has a charge on some property recovered in a suit in which he was employed, and the Respondent says that he recovered nothing whatever, because the suit was practically useless. The solicitor was employed by Mr. and Mrs. *Jones* for the purpose of getting rid of a deed which Mrs. *Jones* had executed, and by which she was bound as fully and effectually as if she had been a *feme sole.* By the deed she purported to convey all her interest in the property, and it contained a statement that her father was dead. It is not necessary now to decide what is the effect of a married woman making a statement of that nature in a deed, but I apprehend that when the point comes to be decided it will be held that it has exactly the same effect as if she were a *feme sole.* However, the suit was carried on, and, as it seems to me, for the benefit of *Heinrich*, who was the purchaser; and then

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(1) 8 D. M. & G. 192. 2 Jur NS 528

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by a compromise, the bill was dismissed and a reconveyance made which was really for the benefit of the purchaser. Under these circumstances, I am of opinion that the property was property recovered by the instrumentality of the solicitor. It was freed from that charge, incumbrance, or cloud which affected it, by the suit; and therefore the solicitor is entitled to the charge he asks for. I can see no difference between the position of the Plaintiffs and the purchaser. He knew that there was a pending suit, and that costs must have been incurred in it, and he ought to have inquired whether the solicitor had been paid; at all events, the purchaser ought not to stand in the way of the solicitor's right to a charge.

I am therefore of opinion that the order was right; and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Wilkinson & Howlett;* Mr. *Fiddey.*

BEATTIE *v.* LORD EBURY.

[1868 B. 257.]

L. JJ.
1872
July 2 8,
11. 29.

Misrepresentation of Fact or Law—Liability to make good Representation—Directors—Personal Liability.

Three directors of a railway company opened, on behalf of the company, an account with a bank, and sent a letter signed by the three as directors requesting the bank to honour cheques signed by two of the directors and countersigned by the secretary. The account having been largely overdrawn by means of such cheques, the bank sued the company at law, recovered judgment in 1865, and issued an elegit. The proceeds being insufficient to satisfy the debt, the bank filed a bill to make the directors personally liable:—

Held (reversing the decision of *Bacon*, V.C.), that the letter did not make the directors personally responsible for the debt, for that, assuming the letter to contain a representation that the directors had power to overdraw the account, and such representation to be erroneous, this was not a misrepresentation of fact which the persons making it were bound to make good, but only a mistaken representation of the law; and, moreover, that even if it had been such a false representation as the directors were bound to make good, the bank would have had no claim against them, since it had been able to

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8 CP. 434
5 QBD 394
6 QBD 703
19 Ch D. 481

enforce the same remedies against the company as if the representation had been true.

Semble, that the letter did not involve any representation that the directors had any other power than the ordinary powers of directors.

In 1864 a negotiation took place between the company and the bank as to the company giving security for the overdrawn account, and in December, 1864, the bank manager wrote to the secretary of the company, "I am directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and *J. A. B.*, to be held for the bank as collateral security, and I am to request that your unissued debentures are to be transferred into the same names, you undertaking to do this when you are in a position to issue them." The secretary replied that the directors assented, and had directed him to allot the shares to the bank manager and *J. A. B.* as collateral security. In the following month, the company having sanctioned the issue of the preference shares, the secretary wrote, "I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank. I propose, as the course usually adopted in such cases, to register the shares in the names of two of the directors of the company, who will execute a transfer of them to you and *J. A. B.* on a mutual understanding that they are to be held by you only as collateral security for the debt due to the bank." The manager replied, "I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them." Preference shares were accordingly issued to two of the directors, and transferred by them to the bank manager and *J. A. B.*, and debentures given to the same two directors, which were similarly transferred. Nothing had been paid on the shares, and the company were not yet in a position legally to issue the debentures.

Held (reversing the decision of *Bacon*, V.C.), that the above circumstances did not make the directors personally liable, and that, on the construction of the correspondence, the directors had not made any representation that the shares and debentures were valid and fully paid-up shares and debentures, but the nature of the agreement was only that the shares and debentures should be placed under the control of the bank, so that when they were taken up by the public the money paid for them must come to the hands of the bank.

Collen v. *Wright* (1), *Richardson* v. *Williamson* (2), and *Cherry* v. *Colonial Bank of Australasia* (3) distinguished; *Rashdall* v. *Ford* (4) approved.

Affirmed by H of L. LR 7 HL 102

THIS was an appeal by the directors of the *Watford and Rickmansworth Railway Company* from a decree of Vice-Chancellor *Bacon*, who had held them personally liable for a debt due from the company to the *Union Bank of London.*

The bill was filed by *John Beattie* and *John Arthur Barton*, the managers, and *John Chapman*, a public registered officer of the

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(1) 8 E. & B. 647. 4 Jur. N.S. 357
(2) Law Rep. 6 Q. B. 276.
(3) Law Rep. 3 P. C. 24.
(4) Ibid. 2 Eq. 750.

[illegible]

L. JJ.
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bank, against Lord *Ebury*, the Hon. *R. A. Capel*, the Hon. *R. W. Grosvenor*, *Joseph Cary*, and *J. H. Dillon*, five of the directors of the *Watford and Rickmansworth Railway Company*, *Alexander Forbes*, the secretary, and the railway company itself.

By the *Watford and Rickmansworth Railway Act*, 1860, passed on the 3rd of July, 1860 (23 & 24 Vict. c. cxi.), it was enacted that the four first-named Defendants, with four other persons, should be incorporated by the name of the *Watford and Rickmansworth Railway Company*; and the same eight persons were named the first directors. The share capital of the company was to be £40,000 in 4000 shares of £10 each.

Sect. 9 provided that the company might borrow on mortgage any sum not exceeding £13,000, but no part of such sum was to be borrowed until the whole of the capital should have been subscribed for and one half paid up.

The *Union Bank* were appointed the company's bankers; and, in pursuance of a resolution passed at a board meeting of the company's directors, held on the 4th of July, 1860, the following letter was on the same day written and sent:—

"To the Directors of the *Union Bank* of *London*, or their Manager,
at the *Temple Bar Branch, Chancery Lane.*

"Gentlemen—

"*Watford and Rickmansworth Railway.*

"Please to honour the cheques of this company signed by two of the directors, and countersigned by the secretary.

"*Joseph Cary*,
"*Reg. Capel*,
"*J. Warwick.*
} Three of the directors of the above company.

"Dated this 4th July, 1860."

Early in 1861 an advance of £6000 from the bank being requested, the bank took from the Defendants, Lord *Ebury*, *Capel*, and *Cary*, and a fourth (then) director, *Warwick*, a letter whereby the writers "undertook," in consideration of the advance of that sum by the bank, "that the said sum of £6000 and interest shall be repaid you within six months from the date of the advance, from the calls due on the shares of the company."

On the 8th of August, 1861, the Defendant *Dillon* became a

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director. The account of the company having become considerably overdrawn, *Beattie*, as manager of the bank, wrote on the 10th of December, 1862, to the solicitor of the company to say that he had been instructed by the directors of the bank to call the attention of the company's directors to the large amount owing to the bank, and to request an early liquidation; and he asked the solicitor to obtain the signature of the chairman and directors to a form of guarantee, which he inclosed, making them personally liable for repayment by the company of what was due. To this form of undertaking the railway directors objected; whereupon, on the 11th of December, Mr. *Beattie* again wrote, saying that he must have the personal guarantee of the directors; and again, on the 12th of December, he wrote, "My application to you on the 10th instant was not for an indemnity by the company, for that would not alter my present position . . . but I require . . . the personal undertaking of every director to hold the bank harmless."

After this *Beattie* had an interview with the five first-named Defendants, and on the 19th of December, 1862, he wrote to Lord *Ebury* as follows:—

"*Watford and Rickmansworth Railway.*

"My Lord,—I have to thank your Lordship and the directors for so kindly granting me an interview; and, in compliance with your request, now beg to state that I shall be obliged by your giving directions for my being allowed to inspect all the books of the company bearing on cash matters; also that I may be furnished with a copy of the share register, shewing the number of shares issued, with the amount of calls in arrear. I have further to request that the unissued shares be given to the bank as collateral security, and that your board will undertake to hand to the bank such preference shares and debentures as you may obtain authority to raise in next session of Parliament."

Of the same date there appeared the following entry in the directors' minute book:—

"Mr. *Beattie* attended on behalf of the *Union Bank* to make arrangements with regard to the debt due to the bank, and a letter was subsequently received from him to which Mr. *Jeyes*" (the then secretary) "was instructed to reply, consenting to his application."

Accordingly, on the same day, the secretary replied, stating that instructions had been given to allow the inspection, and to furnish a copy of the share register shewing the number of shares registered, with the amount of calls in arrear; and the writer continued :—"My directors desire me to assure you that all unissued and all preference shares and debentures to be created by a bill about being introduced into Parliament shall be handed to your bank in a sufficient amount to cover the balance now due upon the account of the company."

On the 13th of July, 1863, was passed the "*Watford and Rickmansworth Railway* (*Sale*) *Act*, 1863" (26 & 27 Vict. c. cxxxi.), intituled "*An Act to grant further powers to the Watford and Rickmansworth Railway Company.*" The Act, by its preamble, recited the former Act, and that the company had constructed the railway, and that the same had been opened for traffic; and continued :—

> "And whereas the company have issued the whole of their shares, and none thereof have been forfeited, and the company have borrowed and now owe £13,000; and whereas the amount which the company are authorized to raise, by shares and by borrowing, is insufficient for the purposes of their undertaking, and it is expedient that they be authorized to raise additional funds."

It was then enacted (sect. 6) that the company might, from time to time, raise (in addition to the sums which they were already authorized to raise) any further sums not exceeding £30,000 by the creation of new shares; and might, from time to time, fix the amounts and times of payment of calls, and dispose of such shares "on such terms and conditions, not being less than the nominal amount," as might be resolved upon; also (sect. 7) that the company might, with the consent of shareholders thereby prescribed, attach to all or any of the shares to be created under the powers of the Act any preferential dividend; provided that such dividend should not exceed £5 per cent. on the amount for the time being paid up; any deficiency not to be made up out of the profits of any subsequent year.

It was also (sect. 9) enacted that all such new shares should be offered to "the then holders of shares or stock in the company;" and (sect. 12) that if at the time of the creation of new shares the

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existing shares or stock were not at a premium, then such new shares might be of such amount, and might be issued in such manner, as the company should think fit.

By sect. 16 the company was empowered to borrow on mortgage an additional sum not exceeding £10,000, but no part of that sum was to be borrowed " until the whole of the additional capital by this Act authorized to be raised by new shares is *bonâ fide* subscribed for or taken, and one half thereof is paid up, and until the company shall prove to the justice who is to certify . . . before he so certifies, that all such additional capital has been subscribed for or taken *bonâ fide*, and is held by the subscribers or their assigns, and that such subscribers and their assigns are legally liable for the same; and by sect. 17 it was provided that all existing mortgages should have priority.

On the same day the following letter was signed and sent :—

"25, *Parliament Street, Westminster, S.W.*,
"13th July, 1863.

"Dear Sir,—We, the undersigned, as directors of the *Watford and Rickmansworth Railway*, agree to become personally responsible to the *Union Bank* to the extent of £4000, now required for the claims due on the company.

"To. *J. Beattie*, Esq.
"*Union Bank, Temple Bar.*
"*Ebury.*
"*Joseph Cary.*
"*F. F. Jeyes*, Secretary."

On the 22nd of January, 1864, *Beattie* wrote as follows to the Defendant *Forbes*, who, in the previous November, had become, and then was, the secretary of the company :—

"In the month of March last, under permission of the directors, I endeavoured to unravel the accounts of this company, with a view to finding out what had become of the large amount of cash drawn from this bank. After several attempts I gave the matter up for the time, and relying upon the promises of the board that the bank debt should be the first charge upon the preference shares and debentures, about to be raised by a bill then in Parliament, I have been anxiously waiting some communication for months in fulfilment of this promise, and in default of the same I have to ask you to call an early meeting of the directors for the purpose of covering my debt with such an amount of shares and debentures, as collateral security, as may be sufficient."

On the 26th of February, 1864, *Forbes* wrote to *Beattie*, stating that the coupons for the half year's interest due on the 1st of March on the company's mortgage deeds would be presented at the bank, and requesting, on behalf of the directors, the manager to give instructions that they might be paid, debiting the company with the various amounts, as on previous occasions.

From the minute book it appeared that, the amount of the coupons being about £325, on the same 26th of February a resolution was passed by the company's directors that for that sum "the undersigned directors do hereby give their personal guarantee.

"*Ebury*,
"*Joseph Cary*, } Directors.
"*Reg. Capel*,
"*Alex. Forbes*, Secretary."

In answer to the last-mentioned letter, *Beattie*, on the 27th, wrote to say he could not pay the interest on the debentures without the personal undertaking of the directors; and on the 29th *Forbes* replied, inclosing the required undertaking, the receipt of which as "a personal undertaking" was acknowledged by *Beattie*.

Throughout the same year repeated applications were made on behalf of the bank for liquidation of the debt.

On the 18th of November, 1864, *Forbes* wrote inclosing to *Beattie* a guarantee. This was in the form of a letter signed by Lord *Ebury* and Mr. *Dillon*, whereby the writers requested the manager to place at the company's credit at the bank the sum of £1000, for which (they said) "we hereby give our guarantee."

At length, on the 8th of December, 1864, *Beattie* wrote to *Forbes* as follows:—

"Dear Sir,—The delay in settling the large amount due to this bank causes my directors considerable uneasiness, and I have been directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and *J. A. Barton*, Esq., of 2, *Princes Street, Mansion House*, to be held for the bank as collateral security; and I am to request at the same time that your unissued debentures are to be transferred to the same names, you undertaking to do this when you are in a position to issue them. As my directors meet on Wednesday next to audit the accounts of this branch, it is most important that I should be in a position to report that their wishes had been complied with, requesting you to bring this before your board, which I understand has a meeting to-morrow."

At a meeting of the company's directors on the 9th of December, the following minute was entered:—

"Read letter, dated the 8th instant, from Mr. *Beattie*, the manager of the *Union Bank*, stating that he has been instructed to apply to the company for a transfer of at least £20,000 of the unissued preference shares of the company into the joint names of himself and *John Arthur Barton*, Esq., of No. 2, *Princes Street, Mansion House*, to be held for the bank as collateral security for the debt owing from the company, and to request that at the same time the company's unissued debentures be transferred to the same names, and that an undertaking be given to them that this shall be done when the company are in a position to issue shares and debentures. Resolved, that the secretary be instructed to reply to Mr. *Beattie's* letter that his suggestion will be complied with."

On the 20th of December, 1864, *Forbes* wrote to *Beattie* as follows:—

"Dear Sir,—I submitted your letter of the 8th instant to the directors, and I am instructed to inform you that they will have no objection to carry out the arrangement you suggest, and have instructed me to allot the shares you name to Mr. *Barton* and yourself, to be held by you as collateral security for the debt owing to the bank." The letter concluded by expressing regret for the delay which had occurred.

On the 28th of December, 1864, Mr. *Alexander Dobie*, solicitor to the *Union Bank*, addressed a letter to the secretary of the company, pressing for payment of "the long outstanding and large" amount due, and threatening proceedings.

On the same 28th of December, 1864, a general half-yearly meeting of the company was held, at which it was resolved "that the directors be and are hereby authorized to issue the new preference capital, £30,000, in shares bearing dividends at the rate of £5 per cent. per annum, subject to the conditions of the Act of 1863, and to the regulations of the company; and that the shareholders already on the books of the company shall be offered allotments prior to the disposal of the shares otherwise by the directors;" should they decline, and the surplus share remain unallotted, then that the directors be authorized to sell, cancel, "or otherwise dispose of the same in such a manner as they may deem most advantageous to the company, and may also, in like manner, dispose of the debentures."

On the 3rd of January, 1865, *Forbes* wrote to *Beattie* as follows:—

"Reverting to the proposal contained in your letter of the 8th ult., and to its acceptance by my directors, conveyed to you by my letter of the 20th ult., I have now to acquaint you that the issue of the new preference shares having been finally sanctioned at the half-yearly meeting of the company, held on the 28th ult., I am now prepared to place the shares and debentures named in your letter in your possession, as collateral security to the bank for the debt owing, pending some more definite, and I trust speedy, arrangement for the liquidation of that debt. I propose, as the course usually adopted in such cases, to register such shares, &c., in the names of two of the directors of the company, who will execute a transfer of them to you and Mr. *Barton*, on a mutual understanding that they are to be held by you only as collateral security to the bank. On hearing from you that you agree to this, the shares and debentures shall at once be prepared and sent to you."

Beattie replied on the 9th:—"In reply to your letters of the 3rd and 9th inst., I beg to say I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them. In no other light would they be taken by the bank."

On the 18th of January, 1865, it appeared from the minute book that at a board meeting of the company's directors proposals were submitted for sealing the below-mentioned preference shares and mortgage deeds, "to be lodged with the *Union Bank* as a collateral security for the debt owing by the company, in accordance with the suggestion in Mr. *Beattie's* letter of the 8th of December, and agreed to by the board's resolution of the 9th."

"Twenty certificates for £1000, representing preference shares, Nos. 1 to 2000, for £10 each.

"Ten mortgage deeds, 16 to 25, for £1000 each, due the 1st of March, 1870, with coupons attached, for interest due thereon half-yearly.

"All the above shares and deeds issued to Lord *Ebury* and Mr. *Dillon*."

"Submitted also two deeds of transfer, conveying the above shares and debentures from Lord *Ebury* and Mr. *Dillon* to *John Beattie* and *John Arthur Barton*, such deeds to be executed by Lord *Ebury* and Mr. *Dillon* in accordance with the arrangement made with Mr. *Beattie*.

"Resolved that the share certificates and mortgage deeds above particularised be sealed.

"The documents were accordingly sealed and attested.

"Resolved, also, that deeds of transfer conveying these deeds and shares to Mr. *Beattie* and Mr. *Barton* jointly, to be held by them as collateral security for the bank debt, be executed by the chairman and Mr. *Dillon*.

"The deeds were accordingly executed and attested.

"Resolved, that the deeds and share certificates be now forwarded to Mr. *Beattie* as collateral security for the debt owing to the bank, as arranged between him and the secretary, and in pursuance of Mr. *Beattie's* letter of the 8th, and the secretary's reply of the 20th of December."

On the same 18th of January, 1865, *Forbes* wrote to *Beattie* as follows:—

"In pursuance of the arrangement suggested by your letter of the 8th ult., and agreed to on the part of the directors of this company by my letter of the 20th ult., I have now the pleasure to forward you herewith the undermentioned preference share certificates and mortgage deeds standing in the names of Lord *Ebury* and Mr. *J. W. Dillon*, two of our directors, accompanied by deed of transfer executed by the above gentlemen in favour of yourself and Mr. *J. A. Barton*, to whom the said debentures are assigned as collateral security for the debt owing to the *Union Bank of London* by this company, viz., twenty certificates of £1000 each, representing 5 per cent. preference shares, Nos. 1 to 2000 for £10 each; ten mortgage deeds for £1000 each, numbered respectively 16 to 25, bearing interest at £5 per cent. from the 1st inst. until the date of the expiration of the deeds on the 1st of March, 1870, and for the payment of which interest ten coupons payable half-yearly on the 1st of March and 1st of September in each year are attached to each deed."

Each of the certificates inclosed in the last-mentioned letter certified that Lord *Ebury* and *Dillon* were the proprietors of the ten preference shares numbered — to — of the company, nothing being stated as to the amount paid up. By each mortgage, which was under the seal of the company, it was witnessed that in consideration of £1000 paid to them by Lord *Ebury* and *Dillon* the company assigned to Lord *Ebury* and *Dillon*, their executors, administrators, and assigns, the undertaking, and all the rates, tolls, and sums of money arising by virtue of the two Acts of Parliament, until the said sum of £1000 and interest from the 1st of January, 1865, at the rate of £5 per cent., should be satisfied; the principal sum to be paid on the 1st of March, 1870. Attached to each deed were ten coupons for interest.

The deeds of transfer of the shares and the mortgages were in the common form.

A letter acknowledging the receipt of these documents "to be held as a collateral security for the debt owing to the bank," was on the same 18th of January sent by *Beattie* to *Forbes;* and on the 30th of January *Beattie* and *Barton* returned the transfers executed by them, with a request that they might be registered.

On the 4th of February, *Forbes* sent to *Beattie* certificates of transfer for the shares and debentures. Indorsed on the back of each was the following memorandum:—

"Notice.

"The preference shares" (or "mortgage deeds,") "within referred to, are transferred to Mr. *John Beattie* and Mr. *John Arthur Barton*, to be held by them as collateral security for moneys owing by the *Watford and Rickmansworth Railway Company* to the *Union Bank of London*, and the holders thereof are not entitled to vote at meetings of the company, or to use these shares" (or "are not entitled

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to use these deeds,") "in any other way than as such collateral security for the said moneys owing to the said *Union Bank of London.*"

The certificate of a justice required by the 16th section of the Act of 1863 had never been obtained, and the company at the time of these transactions had not any authority to borrow money on debentures. The security thus given to the bank was therefore not available.

The bank subsequently brought an action against the company, and on the 25th of March, 1865, judgment was signed for £32,408 6*s.* 9*d.* On the 25th of December, 1865, the directors served a notice on the bank claiming a lien personally on the deposited securities. On the 8th of January, 1866, an elegit was issued under which was realised £212 18*s.* 4*d.* The directors also paid the sums for which they had made themselves liable by written guarantees, but there remained a large sum due to the bank.

On the 8th of August, 1868, the bill in the present cause was filed to make the five directors personally liable for the sum due to the bank, to have the transfer of the shares and debentures cancelled, and to have the names of *Beattie* and *Barton* removed from the register of shareholders.

Vice-Chancellor *Bacon* made a decree directing an account of what was due from the company to the bank, and declaring the directors personally liable to pay to the bank what was due from the company to the bank. The decree went on to direct the transfers of the shares and debentures to be cancelled, and the names of *Beattie* and *Barton* to be taken off the register of shareholders (1).

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(1) 1872. Mar. 6. WN 72, 54.
SIR JAMES BACON, V.C.:—

This suit is brought by the *Union Bank of London*, and persons who represent the interest of that bank, against five of the directors of the *Watford and Rickmansworth Railway Company*, the secretary, and the company. The Plaintiffs seek to enforce the payment by the directors of a sum of upwards of £20,000, and they further ask that certain debentures and certain transfers of shares in the company, which have been made to and in the names of the first-named Plaintiffs, may be cancelled, and that the names of the same Plaintiffs may be removed from the register of shareholders.

These several heads of relief arise out of the series of transactions stated in the pleadings and evidence; but as they are different in kind, and depend upon somewhat different considerations, it appears convenient to deal with them separately.

The railway company was incorpo-

The directors appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Fry*, Q.C., and Mr. *Speed*, for the Appellants:—

As to the letter of the 4th of July, 1860, it is clear that the

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rated by the "*Watford and Rickmansworth Railway Act*, 1860," and in that Act the first-named five Defendants (except the Defendant *Dillon*), were with other persons named as, and the same four Defendants ever since and the Defendant *Dillon*, since his appointment in August, 1861, have continued to be, directors of the company.

The *Union Bank* were appointed and acted as the bankers of the company, and on the 4th of July, 1860, the directors, at a board meeting, resolved that all cheques should be signed by two directors, and countersigned by the secretary for the time being. In pursuance of this resolution, three of the directors signed, and there was transmitted to the bank an order or authority in these terms:—[His Honour read the authority as stated above.]

Cheques were accordingly drawn in the manner specified, and were paid by the bank; and in the result a very large sum became due to the company. Many communications took place between the manager of the bank and the directors with reference to this account; the bank desiring payment of, or security for, the sums due to them, and the directors not having the means of complying with the requests of the bank, the available resources of the company being then all exhausted.

Now it is upon this state of things that the bank, in the first instance, found their claim against the directors. The bank insist that the written authority to which I have referred amounted, in effect, though not in express terms, to a representation by the directors that the company were legally empowered to borrow or take up the sums which had been drawn for by the cheques, and that the company would pay such amount as might become due in respect of them; and that, inasmuch as the company had failed to fulfil their engagement, the directors, upon whose authority the advances were made by the bank, are now personally liable to pay the debt, and make good the default of the company; and that, in this view of the case, it is wholly immaterial whether the company were or were not legally competent to borrow moneys beyond the amount limited by their Act of incorporation.

The other head of relief which the Plaintiffs advance requires a fuller statement. The Act of 1860 authorized the company in the usual manner to raise a capital of £40,000 by the issue of 4000 £10 shares, and to borrow £13,000 on mortgage or bond. Before the end of 1862 the company had constructed the railway, had issued all but 600 of the shares, had exercised their borrowing powers, and were moreover very considerably in debt. It was necessary, therefore, for them to apply to Parliament for authority to raise additional sums; and accordingly a bill had been prepared by them for this purpose.

Matters stood thus when, in December, 1862, the manager of the bank pressed the directors for payment of the amount due, and, after an interview with the five first-named Defendants,

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bank never considered it a guarantee, for they took afterwards several limited personal guarantees from directors, which would have been useless if this letter had been a general one. A man

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he wrote to them a letter on the 19th of December containing this passage:—[His Honour read the request contained in the letter set out above.] At a meeting of the directors held on the 19th of December the receipt of this letter was acknowledged by them, and their then secretary was instructed to reply to the manager, consenting to his application. The secretary did so reply, and in his letter said:—[His Honour read the passage extracted above.]

The only shares which then remained unissued were 600 ordinary shares, and which were afterwards allotted to and registered in the name of the manager, the Plaintiff, Mr. *Beattie;* but upon his finding that such allotment and registration had exposed him to personal liability, and did not constitute such collateral security to the bank as he had by his letter applied for, he filed a bill against the directors, and the company, to have his name removed from the register. In that suit a decree was made in January, 1869, by which he was declared not to be a shareholder, and his name was removed, as he had prayed. It is, therefore, unnecessary to refer further to this topic.

In July, 1863, the company obtained another Act of Parliament:—[His Honour referred to the preamble of the statute, and to the clauses relating to shares and mortgages. These will be found extracted. His Honour continued:—]

Nothing further having been done respecting the bank's debt, in January, 1864, the manager wrote to the Defendant, *Forbes* (who had then become the secretary of the company) to the effect that he had been relying upon the promise of the board, and asking the secretary to call an early meeting. [The letter of the 22nd of January, 1864, is stated above.]

The directors and the secretary promised to do what was thus required, but, delay having ensued, the manager, on the 8th of December, 1864, wrote again to the secretary, thus:—[His Honour read the letter, the minute embodying the resolutions passed on the 9th of December, and Mr. *Forbes*' letter of the 20th of December, 1864.]

At about the same date Mr. *Dobie*, the solicitor to the bank, wrote to the secretary, requiring immediate payment of the amount due by the company to the bank, and threatening legal proceedings. This fact the secretary communicated to the directors at their board meeting held on the 28th of December, 1864. He informed them also that he had duly carried out the intentions of the board, and had, on the 9th instant, written to Mr. *Beattie* the letter of the 20th of December just referred to. Whereupon the directors resolved:—[His Honour read the resolution of the 28th of December, 1864, also the letters of the 3rd and 9th of January, 1865, the resolution of the directors, and the two letters of the 18th of January, 1865; and described the form of the documents which were sent on that day.]

The manager having required certificates of the registry on the company's books of the transfer of the debentures and shares, Mr. *Forbes*, on the 4th of February, 1865, sent to the manager certificates in this form, indorsing upon each of them a notice shewing the purpose for which they had been transis personally liable for misrepresentation if, without authority, he enters into a contract professedly on behalf of another: *Collen* v. *Wright* (1); but if he enters avowedly as agent into a contract by

ferred:—[His Honour read the form of certificate and the indorsement as above.]

In the share register of the company these shares were entered as belonging to "Lord *Ebury* and Mr. *Dillon*;" with this memorandum (see above). The mortgages were also entered in the company's register with this note (see the note above).

Neither at this nor at any other time had the certificate of the justice, required by the 16th section of the Act of 1863, been obtained, nor was the company authorized to borrow any sum whatever on mortgage.

On the 25th of December, 1865, the solicitors for the directors served upon the bank and their manager the following notice:—"In the name of all the directors we are instructed to give you notice that in consequence of certain arrangements which had been entered into between the *Watford and Rickmansworth Railway Company* and Lord *Ebury*, *Joseph Cary*, Esq., and the other directors, those gentlemen now claim a lien upon the preference shares and debentures of the company now on deposit at the *Union Bank*, subject to any prior lien or claim the bank may have thereon. And they further give you notice that upon payment of the sums in respect of which you now hold the same as security, they will require you to cause the said preference shares and debentures to be transferred into their joint names, or to such person or persons as they shall jointly nominate."

I believe I have now stated all the transactions which are material to the subject of this suit. There have been various other proceedings between the bank and the company. The bank brought an action, and in March, 1865, obtained judgment against the company for £32,408; but the debt is disputed in a suit referred to in the pleadings, and which is still pending. Subsequently a sum of £9436 was paid by some of the directors in respect of a direct personal liability incurred by them. A writ of elegit was afterwards issued by the company, upon which a sum of £212 was recovered. But there remains due to the bank a large sum, as the Plaintiffs allege and as the Defendants admit, exceeding £20,000, in respect of their advances; and it does not appear necessary for the present purpose to advert more particularly to these matters.

All the facts I have hitherto stated are admitted or proved in evidence. The Defendants, the directors, and the company, and Mr. *Forbes*, the secretary, have answered separately.

The directors, against whom the principal relief is prayed, admit that the *Union Bank* "became the bankers of the company," and that "they did," but, as the directors say, "well knowing what were the powers of the said company, and at the request of the said company, through the then secretary and solicitor, *F. F. Jeyes*, and the directors of the said company, and upon cheques signed by such directors, or some of them, on behalf of the said company, pay various sums of money to or on behalf of the company, and for the purposes of the company; and all of the

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(1) 8 E. & B. 647. 4 Jur NS 357

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which his principal is bound, he is not under any liability; and even where he had no authority he is not liable to fulfil the contract, but is only liable for the amount of damage occasioned by

said sums were duly applied to the purposes of the said company accordingly." Upon these grounds it has been argued on behalf of the directors that they did not, by the authority of the 4th of July, 1860, incur any personal responsibility. On the part of the Plaintiffs it is contended that the bank were under no obligation to see or to inquire into the ability of the company to contract a debt by borrowing; that it was to them wholly immaterial whether the company could validly contract a debt, or whether they had the means of satisfying the debt—for that the written authority referred to, acted upon as it was, amounted to a representation by the directors that the company were enabled to contract the debt—and an undertaking that, being contracted, such debt should be paid—and, as a consequence, that, the debt remaining due, the directors, upon whose representation it was contracted, are personally liable to pay it.

Many cases were referred to in the course of the argument for the purpose of shewing that persons who had trusted companies not authorized to borrow or to contract certain other forms of debt, must bear the consequences of their own want of caution, and remain without any enforceable remedies against such companies—and there can be no question that such is the well-established law. But I take it to be no less clear that if any agent, or any other person acting on behalf of a company, so acts that, without any words to that effect, his acts amount to a representation that he has authority to enter into the contract upon which the dealings which may be in question are based, he incurs a personal liability to make good such representation. If the authority to draw cheques had been under the seal of the company, the signature of cheques by the directors would have exposed them to no personal liability—because such drawing would have been merely in the exercise of their lawful ministerial powers, and would have been referable only to the original authority given by the company. But the transaction here is of a wholly different character. I do not dwell upon what is said on the part of the Plaintiffs, that the bank in their dealings had reliance upon the high position and the reputation for honour and probity of the directors—because, although I have no doubt that what is so said is perfectly true, such reliance is not enough of itself to impose upon the persons so trusted a legal liability; but, since it is the settled law that persons making representations upon which others are induced to deal with them are bound to make good such representations to their full extent, I cannot hesitate to say that the directors have personally incurred that liability which is sought to be enforced against them in this suit. The authorities for the principle of law to which I have last referred are so numerous and so well known (indeed *Collen* v. *Wright* (8 E. & B. 647) and many others were mentioned in the course of the argument) that it would be a useless occupation of time to cite them more particularly. There are, however, two which I think it right to point attention to. The first is *Richardson* v. *Williamson* (Law Rep. 6 Q. B. 276) in which it was decided that the directors of a company which had no power

(a/s C 4 Jur NS 257)

the alleged principal not being bound, which in this case is nothing. Here, however, the company was liable, for judgment has been recovered by the bank against the company, which is

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to borrow money, had, by signing a receipt acknowledging the deposit of money with the company, to be repaid on demand, in effect represented that they had authority to make a binding contract on behalf of the company, and had become personally responsible to repay the sum so received.

The other is *Cherry* v. *Colonial Bank of Australasia* (Law Rep. 3 P. C. 24), where two of the directors of a mining company, having written to the manager of a bank a letter in which they stated that they, as directors, had "authorized" one *Clarke* "to draw cheques upon the account of the said company," and the company disputing their liability, the bank brought an action against the directors, in which they recovered a verdict, which was ultimately fixed at the amount which became due to the bank in respect of sums overdrawn by the manager subsequent to the date of the letter.

Upon these authorities, then, I think that, in respect of all advances made by the bank after the 4th of July, 1860, the Defendants, the directors, are bound, by reason of the authority of the 4th of July, 1860, to make good the amount due to the bank, incurred upon the faith of that authority.

There remain to be considered the facts relating to the transfer to the two first-named Plaintiffs, as trustees for the bank, of the preference shares and the mortgages. As to these, the Plaintiffs insist that, having regard to the correspondence and the documents I have mentioned, the Defendants, the directors, and their secretary, Mr. *Forbes*, must be taken to have represented as facts that the things which were so transferred were good and valid securities for the whole amount of the debt which was due at the time of the transfer, and which still remains due—such facts being in themselves untrue, and being known by the persons so representing them to be untrue. The Defendants, on the other hand, contend that the Plaintiffs have had all they ever asked for or expected; that the manager in the first instance asked for the shares, under the first Act, which remained unissued, and that this request was complied with; that he further required a transfer of unissued preference shares, to be held as collateral security, and unissued debentures, as soon as the company were in a position to issue them, and that such last-mentioned shares and debentures were duly transferred to him; that the object of the bank and its trustees was to obtain dominion over the shares and debentures, so that the moneys payable in respect of them could not be received by the company without the knowledge of the bank, and so that such moneys should be applied in reduction of the bank's debt; that for this purpose the manager required that "forms" of certificates and mortgages should be lodged in his hands as trustee for the bank, to be held by him as collateral security for the repayment of the debt; that he objected to the shares being registered in his name, and required that they should be registered in the names of two of the directors, and transferred to him, and that such transfer should be lodged with him, together with the before-mentioned "forms"; that the bank was at this time without any security, or any acknowledgment of the conclusive: *Williams* v. *St. George's Harbour Company* (1). The directors throughout were acting within the scope of their powers to bind the company, even taking the letter to authorize the overdraw-

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company's indebtedness, except the debit entries in the company's passbook; and that the manager therefore urged that he should be in possession of the shares and debentures, as much by way of acknowledgment of the indebtedness of the company as by way of security for the debt.

The Defendants, the directors, further state that, the matter having been discussed, it was thought fair and equitable that the bank should have the security they asked for in respect of their debt; that the Defendants, Lord *Ebury* and Mr. *Dillon*, permitted their names to be used simply as trustees for the company; that they never contracted to become *bonâ fide* proprietors of the shares and mortgages, and that it was understood by all parties that they were to be indemnified and held harmless by the company and the bank, and that they should incur no responsibility of any kind, either to the company, the bank, or their trustees. They deny the representations alleged by the Plaintiffs to have been made to them, and assert that the bank and their trustees were aware that nothing had been paid, or was intended to be paid, by Lord *Ebury* and Mr. *Dillon*.

The statements I have referred to are denied by Mr. *Beattie*, in his affidavit made in the cause, and are affirmed by the answers of the Defendants, the contents of which are verified by their respective affidavits. None of the witnesses have been cross-examined, with the exception of Lord *Ebury*, whose personal recollection of the matters in dispute appears to be imperfect, but who has admitted that the advances were made upon the cheques of the directors, and that the shares and mortgages were handed over to prevent the bank from taking the proceedings they had commenced and threatened to pursue, and after he had been served with a writ at the suit of the bank.

In this state of circumstances, the documentary evidence, and that of the surrounding circumstances, is all that the company can rely upon. On the part of the Plaintiffs, it is contended, that, although the evidence does not amount to proof of a verbal or personal representation by the directors, that the transfers were good securities, yet the documents themselves, the correspondence, the minutes of the directors, and the acts they did, have the effect in law of fixing upon the directors a liability to make good the representation thereby conveyed, that the instruments deposited were good collateral security for the debt due to the bank.

The question to be determined is, therefore, whether this contention is well founded, or whether the view suggested by the directors in their answer is that which the Court ought to adopt. Now I must say I find it impossible to conclude, from the undisputed evidence, that the bank or their manager ever meant to be satisfied with the mere possession of "forms" of certificates or mortgages, or with anything less than available and substantial security for the amount admitted to be due to them. With a large debt owing to them, the payment of which had been delayed, ing the account, which we say it did not, being nothing but a direction to the bank as to what should be the proper signature to cheques. The fact that the company was liable disposes of *Richard-*

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(1) 2 De G. & J. 547. 4 Jur N.S. 1066

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which was urgently demanded by them, and for recovering which they had taken, and threatened, legal proceedings, the directors purport to comply with their demand that they should be put into possession of security for their debt. For this purpose, and in order, as it is admitted, to avert the threatened proceedings, documents which are called by the name of "securities," and by no other name, are handed by the directors to the bank. These securities consist of certificates of shares under the seal of the company, representing that Lord *Ebury* and Mr. *Dillon* were "the actual proprietors of" those shares. There is nothing on the face of the certificates to express or imply that the £10, the amount of each share, had not been paid. They are accompanied by formal transfers under the hand and seal of the persons who were stated in the certificate to be "the proprietors of" the shares. Together with these certificates are the mortgages, executed in like manner, each of them purporting to be made in consideration of £1000 paid to the company, acknowledged by the company's seal, and confirmed by the signature of the secretary; and the transfers of these mortgages are also executed by the two directors; each and every of these things having been resolved upon and done by the directors at their board meeting. At a later period, when the bank applied for a certificate that the several instruments had been registered in the books of the company, the secretary sends such certificates, with indorsements upon them, stating that, as to the mortgages, they were to be held by the Plaintiffs as collateral security, but that the Plaintiffs were not entitled to use them in any other way; and, as to the shares, that they also were to be held as collateral security, but that the holders were not entitled to vote at meetings of the company, or to use the shares in any other way than as such collateral security. Besides all this, the directors in a body caused a notice to be served upon the bank, claiming, on behalf of the directors, a lien on the shares and mortgages—as if they were real and actual securities—and requiring the re-transfer to be made into their joint names on payment of the debt. It is under these circumstances that the Defendants, the directors, insist that the bank, which demanded security for their debt, ought to be satisfied with having received things which are no securities, but only the empty "forms" of securities.

Now, having regard to the principles of law established by the cases relied on by the Plaintiffs, and which may be shortly stated to be, that persons dealing in matters of direct personal interest, and making representations upon the faith of which others are induced to advance moneys, or to forbear the enforcement of just demands, or otherwise to act, are bound to fulfil such representations, I find it impossible to say that the Defendants, the directors, did not represent to the bank that, in consideration of their forbearing to resort to legal proceedings for compelling payment of their debt (a debt for which the directors were already personally responsible), they would transfer to them valid securities. Can it be said that their representation was true in fact, or that, by the manner in which

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son v. *Williamson* (1) and *Cherry* v. *Colonial Bank of Australasia* (2). The cases of *Horsley* v. *Bell* (3) and *Higgins* v. *Livingstone* (4), which were cited against us below, have no bearing; they were

the directors dealt, the bank received from them any security whatever? It is admitted that no money had been paid by the directors whose names appeared in respect of either the shares or the mortgages. It is admitted that the company had no power to make any such mortgages. Neither class of the so-called securities is worth more than the paper on which they are written, and the whole of the dealing is as unsubstantial as a dream.

In this state of things, I am of opinion that I am bound to say that the Defendants, the directors, have incurred the liability to pay, and that they must be decreed to pay to the bank, the whole amount remaining due to them, and to take back the utterly worthless instruments which were transferred as I have mentioned.

The company, who are also Defendants, repudiate the authority of the directors to issue the shares as security to the bank, and they insist that the indorsement on the certificates of transfer to the bank was *ultrà vires*, and not binding on the company. They assert that nothing has ever been paid to them in respect of the shares, and that the bank must be taken to have accepted the shares in respect of which they say that £20,000 is due to the company; and further, that they never had power, under the second Act, to borrow moneys on mortgage, and never authorized the creation of such mortgages. They go further by their answer, at considerable length, into several matters relating to the judgment obtained against them by the bank, the validity of which they dispute, and to proceedings in other suits pending, which, as they are not within the scope of the present suit, it is unnecessary to notice further; and they have also contended that the Plaintiffs are not entitled to have their names removed from the register of shareholders in the company, or that if, in any event, it should be held that the Plaintiffs are so entitled, they must pay the costs thereby occasioned, and the company's costs of this suit.

I have nothing to do, at present, with any questions which may exist or may arise between the company and the directors, but I think the Plaintiffs are well entitled as against the company, in whose name, under whose seal, and by the acts of whose directors the several dealings with shares and debentures of which the Plaintiffs complain have been conducted, to the relief which they ask, to have their names removed from the company's register; inasmuch as no valid contract ever existed between the Plaintiffs and the company in respect of those dealings, and they are, in my judgment, wholly ineffectual, and are to be treated as never having taken place.

The decree, therefore, will contain a declaration to the effect that the transfers of the shares and of the mortgages by the directors to the Plaintiffs are wholly null, and an order that they be cancelled. An account must be taken of what is due from the company to the bank for principal and interest, and an order cases of direct contract for the performance of certain works. The overdrawing a banking account in the ordinary course of business does not come under the head of borrowing: *In re Cefn Cilcen Mining Company* (1); *Waterlow* v. *Sharp* (2); *Gibbs & West's Case* (3); so it is hard to make out any mis-statement at all, and if there was, it was a mere misrepresentation of a matter of law, and to such the doctrine as to making representation good does not extend: *Rashdall* v. *Ford* (4).

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(1) Law Rep. 6 Q. B. 276.
(2) Ibid. 3 P. C. 24.
(3) Amb. 770.
(4) 4 Dow. 341.

Then as to the other branch of the case, we say that, looking at the correspondence, it is clear that the bank were not misled by any representation, and in fact only bargained for this, that the unissued shares and debentures should be placed in their hands so that when they were issued the money must come to the hands of the bank. The bank perfectly knew that they were not at the time an available security, and the claim made by this bill is a mere afterthought.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Swanston*, Q.C., Mr. *Wood*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff:—

As to the first point, there is no difference in principle between this case and *Cherry* v. *Colonial Bank of Australasia* (5). There was, by the letter, a representation that all drafts signed in the way there mentioned would bind the company. A person who makes a representation must make it good, whether he knows it to be incorrect or not: *Rawlins* v. *Wickham* (6); nor is *mala mens* a necessary ingredient in the equity: *Slim* v. *Croucher* (7).

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made for payment of the amount which shall be found due by the Defendants to the bank, together with the Plaintiffs' costs of the suit; and thereupon the certificates of shares and debentures will be delivered up by the Plaintiffs to the persons by whom they were deposited, without prejudice to any questions between the co-Defendants. It will be further declared that the entry of the names of the Plaintiffs in the register of the company was improperly made; and ordered that such entry be forthwith cancelled, and that the Defendants do all such acts as may be necessary or requisite to effect such cancellation. Considering the part which has been taken by the secretary in issuing the debentures, at a time when he must have known that no such debentures could be lawfully issued, I can give him no costs of the suit, nor can I give any costs to the Defendants, the company.

(1) Law Rep. 7 Eq. 88.

(2) Ibid. 8 Eq. 501.

(3) Ibid. 10 Eq. 312, 318, 319.

(4) Ibid. 2 Eq. 750.

(5) Ibid. 3 P. C. 24.

(6) 3 De G. & J. 304. 5 Jur NS 278

(7) 1 D. F. & J. 518. 6 Jur NS. 487

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[They also referred to *In re Cork and Youghal Railway Company* (1) and *Kisch* v. *Central Railway Company of Venezuela* (2).]

As to the second point, the bank bargained for security, not for what had only the form of a security, and was, in fact, worth nothing: *Chambers* v. *Manchester and Milford Railway Company* (3). The directors represented that what they were giving was a security, and this representation they must make good.

Mr. *Kay*, Q.C., and Mr. *Locock Webb*, for the company.

At the close of the Respondent's argument on the 11th of July, their Lordships adjourned the case, stating that they would give timely notice in case they should think it necessary to hear a reply.

July 29. Sir G. Mellish, L.J.:—

This is a suit brought by the managers and one of the registered public officers of the *Union Bank* of *London* against five directors and the secretary of the *Watford and Rickmansworth Railway Company*, and also against the railway company itself.

The suit, so far as the directors are concerned, which is the only part of it to which this appeal relates, is a claim on behalf of the *Union Bank* that the directors may be made personally liable for a sum of about £22,000, a debt due from the *Watford and Rickmansworth Railway Company* to the bank from their having overdrawn their account.

The claim is founded upon this: it is said that the directors made representations on the faith of which the bank acted, that these representations were untrue, and that consequently they must in this Court make good those representations. The first representation, on which the Vice-Chancellor has determined against the directors, is a representation that the directors had authority to bind the railway company by entering into a contract with them for loans, and to overdraw their account, and also a representation that the railway company would pay, and that these representations were not fulfilled. The second, and which,

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(1) Law Rep. 4 Ch. 748.

(2) 3 D. J. & S. 122; 11 Jur NS 646 Law Rep. 2 H. L. 99.

(3) 5 B. & S. 588, 609. 10 Jur NS 700

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as far as the bill is concerned, is obviously the main ground of the suit, is that certain shares and debentures were transferred by the railway company to the *Union Bank* as a security for their debt, and that the directors represented that they were valid shares and valid debentures fully paid up so as to form a valid security for the debt, whereas in fact they were totally unpaid up, and were no security at all.

The facts as to the first part of the case may be shortly stated thus: In July, 1860, on the day after the passing of the Act of Parliament which constituted the railway company, three of the directors, Messrs. *Cary*, *Capel*, and *Warwick*, signed and sent to the bank the following document:—"To the Directors of the *Union Bank* of *London*, or their Manager, at the *Temple Bar Branch*. Gentlemen—*Watford and Rickmansworth Railway*—Please to honour the cheques of this company signed by two of the directors, and countersigned by the secretary. Dated this 4th July, 1860." One of those directors, Mr. *Warwick*, is not one of the Defendants, and Mr. *Dillon*, who is a Defendant, was not at that time a director at all. That document having been sent, the account was thereby opened between the railway company and the *Union Bank*, and the allegation in the bill is, "The said *Union Bank* of *London* were duly appointed and became the bankers of the company, and, at the request of the directors, paid various sums of money to and on behalf of the company and for the purposes of the company, and all such moneys were applied for such purposes accordingly." The bill then goes on to state that the directors and the company having, in the month of December, 1862, become largely indebted to the bank, the bank required payment. Thus the bill alleges that all the moneys which were drawn out were drawn out on behalf of the company, and were applied for the purposes of the company.

Then the debt having been so incurred, for some part of the debt, which was a debt for precise loans, the directors were asked to give and did give their personal guarantees, and in March, 1865, the bank sued both the company and the directors to recover the money due. Thereupon the directors paid a sum of about £10,000, which represented the sum they had guaranteed, but for the rest of the money the bank recovered judgment against the railway company. After that they issued an elegit, and they recovered all the money that they could recover. There has, it appears, been a suit in Chancery for the purpose of administering the affairs of the company, and in that suit, as well as in this suit, the railway company allege that they are not bound by this overdrawing of the account, but, nevertheless, up to the present time no bill has been filed to set aside that judgment, though it was obtained so far back as March, 1865.

The question is, on those facts, are the directors personally liable for making a representation to the manager of the bank to the effect that they had power to overdraw the account, that representation being untrue? The Vice-Chancellor has decided that they are so liable on the authority of three cases, which are all cases in the Courts of Law, and which come to this, that where an agent makes a contract on behalf of his principal he impliedly warrants that he has authority to bind that principal, and if it turns out that he has no authority to bind his principal, and the principal repudiates the obligation, and loss is thereby occasioned, then an action on that warranty can be maintained. But if those cases are examined it will be found in all of them that there was a misrepresentation in point of fact as to the agent having power to bind his principal, and though I have not found any case in the Courts of Law on the question, I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable. For instance, supposing when an agent comes and professes to make a contract on behalf of his principal, instead of trusting his representation that he has power to bind his principal the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal was shewn to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the principal, and then after that a contract was

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made, and it turned out when the point was raised in a Court of Law that the power of attorney was insufficient—under such circumstances I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in point of law.

I will shortly state the three cases which were relied upon before the Vice-Chancellor to shew that they all involve a misrepresentation in point of fact. The first case mentioned on the subject was *Collen* v. *Wright* (1). That was a simple case, where the steward of a gentleman executed an agreement for a lease in his name, and when a suit was brought for specific performance it turned out that the gentleman had never given any authority to the steward to make an agreement for a lease in his name. Specific performance was therefore refused. The Plaintiff then brought an action against the steward to recover damages, and was held entitled to recover. There it is perfectly plain that the Defendant had made a misrepresentation in point of fact.

The next case was the case of *Richardson* v. *Williamson* (2). There the Plaintiff lent £70 to a benefit building society, and received a receipt signed by the Defendants, as two of the directors, certifying that the money had been lent, and then it turned out that in point of law they had no power to borrow money. But, then, their power to borrow money depended upon whether they had made a rule to borrow money, because a benefit building society may receive money, at any rate to a certain amount, on deposit, if it has a rule enabling it so to receive money. Therefore that was taken as a representation by the directors that they had such a rule, and that the borrowing was within the rule when, in point of fact, there was no such rule at all.

Then the third case, and the one which I think has been principally relied upon in the argument before us, was *Cherry* v. *Colonial Bank of Australasia* (3). There the directors of a joint stock company gave authority to their manager to overdraw the account. If the facts of the case are examined it will be found that the directors had power to borrow money, provided they got the consent of a meeting of the shareholders, but not otherwise.

(1) 8 E. & B. 647. 4 Jur NS 357 / (2) Law Rep. 6 Q. B. 276.
(3) Law Rep. 3 P. C. 24.

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There was, therefore, a misrepresentation in point of fact, because when they represented they had power to borrow they practically represented they had obtained authority from a meeting of the shareholders to enable them to borrow.

Now, although I have found no case at law, there is a case in equity which clearly shews that the rule in this Court is that a person cannot be made liable for making a misrepresentation unless it is a misrepresentation in point of fact, and not merely in point of law. I think anybody would be startled if it was said that if you asked somebody what was the law upon a particular point, and he gave you his opinion as to what the law was, and you acted upon it and altered your position, a bill could be maintained against him to make good the representation, if his opinion turned out to be wrong. The case I refer to is *Rashdall* v. *Ford* (1), the head-note to which is as follows:—"The Plaintiff alleged, that being desirous of advancing money on debentures, he applied to a secretary of a railway company, who wrote offering him a bond of the company for £1500, and stating that the company were not yet in a position to issue permanent debentures; but that they expected to be able to do so in four or five months' time. With the letter was sent a prospectus, from which it appeared that the company was incorporated by Act of Parliament, and that three persons named were directors. Plaintiff advanced the money and received in return a *Lloyd's* bond, signed by the secretary, whereby the company purported to acknowledge the debt, and to covenant to pay the same with interest at 6 per cent. The company having ceased to pay interest, and being in difficulties, Plaintiff filed a bill against two of the three directors, and the representatives of the third, praying that they might be decreed to pay the amount advanced by the Plaintiff, with interest:—Held, that the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of a matter of law, and demurrer by the representatives of the third director allowed." Now, in that case, as far as regards there being a representation that they had power to bind the company, there was as direct a representation as could possibly be conceived. The Plaintiff offered to lend money to the

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(1) Law Rep. 2 Eq. 750.

company, and the company said, We will give you a *Lloyd's* bond as security, and they gave him a *Lloyd's* bond as security. According to the authorities, that was a representation that they had power to bind the company by a *Lloyd's* bond, but because, as a matter of law, a *Lloyd's* bond is not a good instrument binding upon the company when it is given for money borrowed, and as it was as much the business of the Plaintiff as of the directors to know what the law was, it was held that no suit could be maintained.

I have stated what I conceive to be the law on this point, because the Vice-Chancellor has not gone into the question as to whether the representation, if there be one, by the directors of the company in this case, that they had power to bind the company by borrowing money and overdrawing the account, was a misrepresentation of fact. Now, what do the words of the letter of the 4th of July, 1860, amount to? I must confess that this document appears to me nothing but the common ordinary notice which directors of a joint stock company or a railway company would send when they intended to open an account with a bank. No doubt it contains representations of fact. It is headed "*Watford and Rickmansworth Railway*;" that is a representation that the railway company had obtained their Act of Parliament, and was an incorporated railway company. It is signed by three directors; that is a representation that those three persons are directors; and I think when it says, "Please to honour the cheques of this company signed by two of the directors, and countersigned by the secretary," that is a representation that the directors had agreed to open an account with the *Union Bank*, and that the cheques which would be drawn upon that account would be signed by two of the directors and the secretary. Does it represent anything more? What does it represent respecting the authority of the directors to overdraw? Does it represent more, or could it be understood by the manager of the bank to represent more, than that they had the ordinary authority, whatever that may be, of railway directors to bind the company? It surely does not represent, and could not be fairly or properly understood to mean, that the directors of the *Watford and Rickmansworth Railway Company* had some power to bind their company beyond that which the

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directors of other railway companies in the kingdom have. It appears to me that there is no representation made respecting the authority, except that they were directors of the railway company, and therefore had such authority as the directors of a railway company have, and I cannot think that the manager of the bank understood it in any other sense. Then if that was so, there is no misrepresentation in point of fact in the document, and that is an answer in my opinion to the first ground.

I am not quite certain whether the Vice-Chancellor did not think that there was a representation that the company would pay, so as to make them liable upon the misrepresentation simply because they have not paid. I do not say that with certainty, for after reading his judgment I am not quite clear what the ground was on which he really proceeded. If he did proceed on that ground, I should remark that there is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise. The directors cannot be liable on the ground that the company have made default, and have not paid the amount, unless according to the true construction of this document it amounts to a guarantee. It is perfectly plain that it does not amount to a guarantee, and moreover I think it perfectly plain that the *Union Bank* never considered it to amount to a guarantee, for when they wanted a guarantee from the directors (and for a very considerable part of the sum they did require the guarantee of the directors), they asked them to give a separate guarantee, which shews that unquestionably they never relied on this document as a guarantee.

If it were necessary, there appears to me to be another answer to this part of the case, viz., that there is nothing to shew that the directors had not power to bind the company; and at all events there is nothing to shew that the bankers have not got all the benefit which they would have had if the directors had had power to bind the company. The Solicitor-General, as I understood him, put his argument thus: He said that directors cannot bind their company by borrowing money, even from a bank, but they may bind them by drawing cheques in payment of debts which have been properly incurred, although the account is thus overdrawn. Whether that is a correct statement of the law or not, I do not think it necessary in this case to give any opinion, because the authorities on the subject do not agree very well with each other, and the question is one of considerable difficulty; but supposing that to be the law, there is not the slightest evidence that the directors made any misrepresentation in point of fact. Whenever the company told the bank they wanted a loan they made a loan; and in the pass-book, when they were loans, they were headed "Loans," and it is by no means clear that the whole of the loans have not been repaid by the directors. In respect of the other sums, there is not an atom of evidence to shew that the whole of those other sums which were not direct loans were not overdrafts, which, according to the rule laid down by the Solicitor-General, would be perfectly legal, viz., drafts drawn to pay the debts due by the company. In fact, the bill alleges that they were so, and therefore there is no case made upon that ground.

Again, it is to be observed that the bank brought their action, recovered judgment, and issued execution against the company. What further benefit could they have obtained had it been perfectly clear that the directors had power to bind the company? Seven years have elapsed, and I should be very much surprised if after such a lapse of time as this any bill would be successful which might be filed by any shareholder of the company for the purpose of setting aside that judgment—a perfectly honest judgment—for a debt for which the company had received full consideration. It appears to me, for that reason also, that the directors are not liable on the first ground on which the Vice-Chancellor rested; for supposing them to have represented—which, in my opinion, they did not—that the directors had power to bind the company by borrowing money, the bank have not sustained damage to the amount of a shilling by the absence of such a power, inasmuch as they have had every remedy against the company which they could have had if such power had existed.

The second ground upon which the Plaintiffs rely is this:

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After the debt had been incurred, the bank very naturally became anxious as to how it should be paid, and a correspondence took place which ended in the directors transferring to two of the managers of the *Union Bank*, in trust for the bank, £20,000 preference shares which they had been authorized to raise by the second Act which was passed in 1863, and £10,000 debentures. The Plaintiffs contend that the directors represented that these were paid-up shares and paid-up debentures—valid shares and valid debentures—and are bound to make good the loss arising from the fact that that representation was not true.

Upon this part of the case the first thing to be decided is what—according to the true construction of the letters which passed between the manager of the bank and the secretary of the railway company—was the security which the railway company agreed to give the bank? The Plaintiffs contend that the company agreed to allot the shares and issue the debentures to persons who had given full consideration for those shares and debentures, and then to procure those persons who had so received the shares and debentures to transfer them to the trustees of the bank. On the other hand, the Defendants say that there never was any agreement to that effect, but all that was intended was that the company should place these shares and debentures under the control of the bank, and give the bank the power of issuing them; so that if there were any persons among the public who were willing to take the shares or the debentures at their full price, then the bank should, by having the shares and debentures standing in the names of trustees for them, have security that the money paid by the public in taking them up should come through the bank, and so go in satisfaction of their debt. When I say "paid-up shares," it is necessary to distinguish between shares which have actually been paid up and shares which may be entered as paid up; for one possible view of some of the letters which passed is that the secretary of the company thought that these shares and debentures might be legally entered as paid up, and transferred as paid-up shares and debentures. He might very well have thought so, without thinking that anybody would pay the amount in cash, or give full value for them. Although this would clearly be a mistake in law, it would not be a very extraordinary mistake. If the debt to the bank was, as I am disposed to think it was, a good debt, the bank might have agreed to take the shares or the debentures in satisfaction of that debt; and if they had so taken them, that would have made them paid-up shares and paid-up debentures, and it would not be an extraordinary mistake for any one to suppose that if they were transferred, not in satisfaction but as security, that nevertheless the debt due from the railway company to the bank would justify the railway company and the bank treating them as paid-up shares. I only state that as one of the possible explanations of these letters.

But I must proceed to read the letters for the purpose of seeing which of the two views is correct, and what was the real contract between the railway company and the bank as to giving security.

The first letter was written in December, 1862, by Mr. *Beattie* to Lord *Ebury*:—[His Lordship read the letter of the 19th of December, 1862.]

This letter obviously was written before the company obtained the second Act, and when they intended to obtain it. What is the meaning of that passage, "that your board will undertake to hand to the bank such preference shares and debentures as you may obtain the authority to raise in next session of Parliament?" It appears to me that that clearly bears the meaning which the Defendants put upon it. That is very important, because this is the beginning of the negotiation, and this is the letter written by the manager of the bank himself. It seems to me utterly impossible that Lord *Ebury* when he read this letter could have supposed it to mean that Lord *Ebury* or some of the other directors should pay up to the railway company the full value of those shares and debentures and then transfer them to the bank. It seems to me that it means what the Defendants say, that the company should give the bank the power of issuing the preference shares and the debentures, so that if the public took them up the bank might get the money. The minute entered in the minute book is this:—"Mr. *Beattie* attended on behalf of the *Union Bank* to make arrangements with regard to the debt due to the bank, and a letter was subsequently received from him to which Mr. *Jeyes* was instructed to reply consenting to his application." The answer by the secretary was this:—[His Lordship read the secre-

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tary's letter, which is given above.] I cannot conceive this to mean anything more than what I have said, that the bank was to have the power of issuing the shares and debentures so as to obtain the money which the public might give on taking them up.

The next letter is one from Mr. *Beattie*, dated the 22nd of January, 1864, after the second Act had been obtained:—[His Lordship read this letter, and the letter from *Beattie* of the 8th of December, 1864, the minute of the 9th of December, 1864, and the letter of the 20th of December, 1864, from *Forbes* to *Beattie*.]

Now what is the bargain made in that last letter? Reliance was placed on the use of the word "transfer" in the proposal made. "I have been directed to apply to you for a transfer of at least £20,000 of the unissued preference shares." Who were to execute the transfer? No doubt the company. The letter is written to the secretary. There is not a word in these letters that I can see from beginning to end which raises any suggestion that either the directors or any one else were to come under any personal liability. If what was understood was, that some person who had paid full value or had given full consideration was to give up his own property for the purpose of securing the bank, surely it would have been stated in plain terms. When we find letters written by the manager of the bank simply asking the directors in their character of directors of the railway company to give security, surely that must mean such security as the directors in their character of directors can give. It was quite obvious that the company had no power to pay up their own shares, and to transfer them as paid up. All that they could do was to give the bank the power of issuing the shares, so that when the shares were taken up, if they ever were taken up, the money would come into the bank. It may be quite true that it was a very imperfect security; there is nothing to shew that the bank did not treat it as a very imperfect security, they gave no consideration, they did not bargain to give any time, and in point of fact they did not give any time (for these letters having been written in 1864, and the transaction completed in January, 1865, the bank commenced their action, and got their judgment in March following). They were simply asking the company to give such security as they could. Then, if we look at the answer of the secretary the matter appears to be made perfectly clear, for he has translated the expression "transferred into the joint names of myself and Mr. *Barton*" as follows: "I am instructed to inform you that they (the directors) will have no objection to carry out the arrangement you suggest, and have instructed me to allot the shares you name to Mr. *Barton* and yourself." It was therefore understood that the shares were to come direct from the company. The shares and debentures, however, were not in fact allotted direct to the manager of the bank, but were first allotted to Lord *Ebury* and Mr. *Dillon*, and perhaps it is right to shew, as far as it can be done, how that came to pass.

I may observe that on the 28th of December, whilst these negotiations were going on, Mr. *Dobie*, the solicitor of the bank, wrote a letter to the secretary simply demanding payment of the money. Then on the 3rd of January there is this letter from the secretary of the railway company to *Beattie*:—[His Lordship read the letter.]

Now looking to this letter, when the secretary says: "I propose, as the course usually adopted in such cases, to register the shares in the names of two of the directors of the company, who will execute a transfer of them to you," could Mr. *Beattie*, or any one who understood the letter and read the letter have possibly supposed that these two directors were to pay full value for the shares. That is what the Plaintiffs now contend for—their case being that Lord *Ebury* and Mr. *Dillon*, the two directors into whose names these shares were transferred, and from them transferred to the two managers of the bank, represented that they had given full value for those shares. But when we look at the words, "I propose as the course usually adopted in such cases to register the shares in the names of two of the directors," can any one possibly suppose that those two directors had paid up the full amount of the shares and debentures? The next letter is this, from Mr. *Beattie*:—"In reply to your letters of the 3rd and 9th inst., I beg to say I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them. In no other light would they be taken by the bank." Does not this shew that the bank perfectly understood the proposal in the sense now contended for by the Defendants, for the bank in fact say by this letter: "You may transfer the shares and debentures into the names of trustees for us, and if you dispose of them then the per-

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sons who give the money for them will come to us and get the transfer from our trustees, and so the money will come to us." I cannot but think that if there had been any doubt upon any of the other letters that last letter would have made the matter quite clear.

Then we have a letter from the secretary of the railway company to Mr. *Beattie* on the 18th of January:—[His Lordship read that letter.] It is quite impossible that that letter or the heading of the document could alter the bargain and the undertaking contained in the previous letters.

Reliance was placed on the form of the certificates and the form of the debentures. The certificates are in a form which does not shew whether they are paid up or not. The debentures, no doubt, are in the common form, as if they were paid up, which debentures always are. I think, indeed, that if the directors had sold these shares and debentures in the market there would have been an implied warranty that they would have been available as shares and debentures, and that they were paid up; but I think that here the terms of the negotiation between the parties exclude any such warranty.

The conclusion I come to upon the whole of this case is, that from the beginning to the end Mr. *Beattie* knew the whole circumstances of this railway company just as much as the directors themselves knew them; that there was no concealment from him, and that there was no deception in point of fact, and no mistake in point of fact. Whether there was any mistake in point of law, whether, for instance, either party supposed that these might be treated as paid-up shares and paid-up debentures, although they were not paid up, I do not know; but it appears to me that Mr. *Beattie* must have known from the nature of the transaction the real state of the facts.

I do not go into the evidence, which is somewhat contradictory, as to what passed at interviews between Mr. *Beattie* and Mr. *Forbes*. I think this case is to be decided on the written documents which were shewn to, seen by, and acted upon by the directors, and that it is wholly immaterial to consider what passed between the secretary and the manager in private.

No doubt the directors had not power to issue debentures, because they had not got a certificate from a magistrate, and they could not get a certificate until the shares were paid up; but in my opinion Mr. *Beattie* knew that these shares were not paid up, and therefore knew that in point of law the time had not come when the debentures could be issued. Upon the whole, therefore, I have come to the conclusion that the directors did not make any misrepresentation in point of fact, and that the managers of the *Union Bank* were not deceived by any alleged misrepresentation; that consequently the case against the directors fails, and as against the directors who have appealed the bill must be dimissed with costs.

SIR W. M. JAMES, L.J.:—

I am entirely of the same opinion.

Solicitors: Mr. *Dobie*; Messrs. *Baxter, Rose, Norton, & Co.*; Mr. *W. Clarke.*

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ASSIGNMENT OF ALL DEBTOR'S PROPERTY—*Bill of Sale—Act of Bankruptcy—Bankruptcy Act*, 1869, *ss.* 13, 72.] An advance of £55 was made to a trader, on the security of bills of sale of all the goods and effects of the trader, which were valued at £600. There was an agreement between the lender and the trader that the bills of sale should be from time to time renewed, so as to render it not necessary to register them. The bills were accordingly renewed every nineteen days, and this was done three times. The trader then became bankrupt:—*Held*, that the last bills of sale were invalid, as constituting an act of bankruptcy.—Decision of *Bacon*, C.J., affirmed. *Ex parte* Cohen. *In re* Sparke - - - 20

2. —— *Bankruptcy—Substantial Exception—Pension from the East India Company.*] A debtor executed as security for an antecedent debt of £1500, an assignment which included all his property of any appreciable value, except a pension of 10*s.* 6*d.* a day to which he was entitled as a retired servant of the *East India Company*:—*Held* (affirming the order of *Bacon*, C.J.), that as this pension would not pass to a trustee in bankruptcy, and could not be taken in execution by a creditor, it constituted no substantial exception from the assignment, which, being an assignment of substantially the whole of the debtor's property, was an act of bankruptcy. *Ex parte* Hawker. *In re* Keely - - - - - 214

3. —— *Bankruptcy—Practice—Notice of Appeal—Bankruptcy Rules*, 1870, *Rule* 144—*Act of Bankruptcy — Fraudulent Conveyance — Bankruptcy Act*, 1869, *s.* 6.] The law that a conveyance of a man's whole property to secure a past debt, whether he be a trader or a non-trader, is an act of bankruptcy, has not been altered by the *Bankruptcy Act*, 1869.—Decision of *Bacon*, C.J., reversed.—The effect of Rule 144 of the Bankruptcy Rules, 1870, which prescribes that four days' notice of an appeal shall be given, is merely that the appeal motion shall not be heard until the four days have elapsed. *In re* Wood .. 302

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BANKRUPT SHAREHOLDER—*Company—Winding-up—Companies Act*, 1862, *ss.* 75, 77.] A contributory in a mining company became bankrupt, and obtained his order of discharge. Nearly two years afterwards a call was made under the winding-up :—*Held* (affirming the decision of the Registrar), that the contributory was released by the order of discharge from all liability to the call. *Ex parte* MARSHALL. *In re* WADDINGTON - 324

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BANKRUPTCY IN TWO COUNTRIES—*Double Proof—Bankruptcy Act*, 1861, *s.* 152.] *D.*, who carried on business in *England* under the firm of *D. & Co.*, and in *Brazil* under the firm of *D., L., & Co.*, executed a deed of assignment of all his property for the benefit of his creditors, which was registered under the *Bankruptcy Act*, 1861. His Brazilian assets were administered under a *concordata*—a proceeding analogous to bankruptcy—under which by the law of *Brazil* the creditors whose debts were contracted in the name of the Brazilian firm had priority. The holders of certain bills of exchange drawn by *D., L., & Co.* upon, and accepted by, *D. & Co.*, proved in *Brazil*, and received a dividend. They then claimed to prove in *England*, and the proof was admitted without qualification by the County Court Judge :—*Held*, on appeal, that sect. 152 of the *Bankruptcy Act*, 1861, did not apply, as there were not two estates being administered in bankruptcy, but one estate, which was administered partly in *Brazil* and partly in *England* : and that the billholders could not receive a dividend in *England* until all the creditors had received a dividend at the same rate as the Brazilian dividend. *Ex parte* WILSON. *In re* DOUGLAS - - - - 490

BANKRUPTCY JURISDICTION — *Composition Deed—Opening Account—Creditors.*] The Plaintiff had made a composition with his creditors, under which he paid them 8*s.* in the pound, and was released from his debts. One of the creditors was the Defendant, who had been agent for the Plaintiff, and claimed from him a balance of £300 on which he received the composition. The Plaintiff afterwards filed the bill in this suit against the Defendant, alleging that the Defendant had made overcharges, and asking for an account and payment of the balance. Overcharges were shewn :—*Held* (affirming the decision of the Master of the Rolls), that this Court had jurisdiction in the matter, and that the Plaintiff was not obliged to apply to the Court of Bankruptcy :—That the

BANKRUPTCY JURISDICTION—*continued.*
composition deed was not a bar to the suit:—That the Defendant could not set up any rights of the creditors in bar of the suit. Pike *v.* Dickinson 61

2. —— *Setting aside Bill of Sale—Bankruptcy Act,* 1869, *s.* 72.] On the 5th of May, 1871, *L.* filed a petition for liquidation by arrangement. On the 9th of May *B.* was appointed receiver, and took possession of the debtor's goods. On the 9th of June the creditors passed resolutions appointing *B.* trustee, and accepting a composition for which promissory notes were to be given and handed to *B.* for distribution among the creditors. On the 27th of July, *B.* having a lien on the goods for his costs, *L.* gave him a memorandum by which, in consideration of *B.'s* satisfying a distress for rent, and giving time for payment of the costs, he agreed to give *B.* a charge on the goods for the costs, and to execute any deed required for giving effect to that charge. *B.* delivered his bill of costs, and in August *L.* gave him a bill of sale of the goods for the amount, upon which the goods were delivered to *L.* *L.* afterwards applied to the Court of Bankruptcy for taxation of *B.'s* charges and an account of the moneys received by him, and to have the bill of sale set aside as obtained by pressure:—*Held* (affirming the decision of the Registrar), that the Court of Bankruptcy had no jurisdiction to set aside the bill of sale, and that, therefore, no relief could be given on the application.—*Semble,* that there would have been jurisdiction to settle the amount of *B.'s* charges if it had not been settled between the parties, that being a matter incident to the composition. *Ex parte* Lyons. *In re* Lyons - - - 494

BEQUEST OF SHARE OF PARTNERSHIP PROPERTY—*Will—Specific Legacy—Exoneration.*] *F.* and *L.* were partners entitled in equal shares. Part of the assets consisted of leasehold premises vested in them as joint tenants, in which the business was carried on. *F.*, by his will, bequeathed to *L.* "all my share of the leasehold premises in which my business is carried on." After *F.'s* death the assets of the partnership proved insufficient to pay the partnership debts, though *L.* and the estate of *F.* were amply solvent. *L.* bought the share of *F.* in the leasehold premises, without prejudice to his rights under the bequest; and a certificate having been made in a suit for the administration of *F.'s* estate, shewing that it was solvent, *L.* presented a petition to have it declared that the effect of the bequest was to give him a moiety of the leasehold, exonerated out of *F.'s* estate from the partnership debts, and for the return of the purchase-money which he had paid:—*Held* (reversing the decision of *Stuart,* V.C.), that the bequest only gave such interest in the leasehold as *F.* had, namely, a right to a moiety subject to payment of the partnership debts; and that as the partnership debts exhausted the assets the bequest failed. Farquhar *v.* Hadden - - - - - 1

BILL DRAWN AGAINST CARGO—*Lien—Equitable Assignment.*] *B.* consigned to the Defendants by the ship *Acacia* a cargo which had been purchased at the joint risk of himself and the Defendants, and advised them of the particulars of bills which he had drawn against the cargo payable to his own order. The Defendants replied, promising to protect the bills. *B.* indorsed to the Plaintiffs three of these bills, which ran, "Pay to the order of myself the sum of £ sterling, which place to account cargo per *A.*" *B.* having stopped payment, the Defendants refused to accept the bills; but after selling the cargo, offered to pay to the Plaintiffs the surplus of the proceeds, after satisfying a balance due to them from *B.* on the general account between them. The Plaintiffs refused to accept this, and filed their bill, claiming a lien for the full amount of the three bills:—*Held* (affirming the decision of the Master of the Rolls), that the Plaintiffs had no lien on the proceeds of the cargo. *Frith* v. *Forbes* (4 D. F. & J. 409) discussed. Robey & Co.'s Perseverance Ironworks *v.* Ollier - - - - 695

BILL OF EXCHANGE—Contract of indemnity—Proof in winding up - - 99
See Letter of Credit.

—— Drawn against cargo—Lien - - 695
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BILL OF SALE—Assignment of all debtor's property - - - 20, 214, 302, 636
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—— Jurisdiction of bankruptcy to set aside 494
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BREACH OF TRUST—Directors of building society
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—— Plea of purchase without notice - 259
See Purchase for Value without Notice.

BROKER—Custom of Stock Exchange - 733
See Custom of Stock Exchange.

BUILDING SOCIETY—*Company—Breach of Trust by Directors—Unauthorized Deposit of Money with another Company—Money still in the hands of the borrowing Company—Manager—Agent—Money Demand—Jurisdiction.*] The directors of a building society deposited money, in a manner unauthorized by their rules, with a finance company, the manager of which was also manager of the building society. Afterwards the deposit was called in, and the directors of the finance company gave a cheque for the amount to their manager, to be paid by him to the building society. He appropriated it to his own use. A bill was then filed by the trustees of the building society to recover the money from the finance company:—*Held* (reversing the decision of the Master of the Rolls), that the manager held the money as agent for the

BUILDING SOCIETY—*continued.*

finance company until he should pay it to some person competent to give a receipt on behalf of the building society; and that as he never paid it over, the money must be taken to be still in the hands of the finance company, who were liable to repay it to the building society:—*Held*, also, that as it was trust money a suit to recover it was maintainable, and the finance company were accordingly ordered to repay the money, with interest. Hardy *v.* Metropolitan Land and Finance Company - 427

CALLS—Bankrupt shareholder - - 324
See Bankrupt Shareholder.

CANCELLATION—Shares—Misrepresentation in prospectus - - - - 55
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CASES—*Barned's Banking Company, In re* (Law Rep. 2 Ch. 350) observed on - 207
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—— *Barrow* v. *Wadkin* (24 Beav. 1) approved of
See Conversion. [343

—— *Blanchard, In re* (3 D. F. & J. 131) explained
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—— *British and American Telegraph Company* v. *Colson* (Law Rep. 6 Ex. 108) disapproved of
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—— *Carter* v. *Carter* (3 K. & J. 617) disapproved of - - - - - 259
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—— *Cherry* v. *Colonial Bank of Australasia* (Law Rep. 3 P. C. 24) distinguished - 777
See Liability of Directors.

—— *Collen* v. *Wright* (8 E. & B. 647) distinguished
See Liability of Directors. [777

—— *Cousens* v. *Cousens* (Law Rep. 1 Ch. 48) observed upon - - - - 513
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—— *Coutts* v. *Acworth* (Law Rep. 8 Eq. 558) considered - - - - 244
See Voluntary Settlement. 1.

—— *Day* v. *Luhke* (Law Rep. 5 Eq. 336) followed
See Sale of Public House. [12

—— *Dunlop* v. *Higgins* (1 H. L. Ca. 381) discussed
See Acceptance of Shares. [587

—— *Everitt* v. *Everitt* (Law Rep. 10 Eq. 405) considered - - - - 244
See Voluntary Settlement. 1.

—— *Foxwell* v. *Bostock* (12 W. R. 723) considered
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—— *Frith* v. *Forbes* (4 D. F. & J. 409) discussed
See Bill drawn against Cargo. [695

—— *Garrard* v. *Lord Lauderdale* (2 Russ. & My.) discussed - - - - 71
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—— *Graham, Ex parte* (5 D. M. & G.) observed upon - - - - - 142
See Discharge of Surety.

—— *Marner's Trusts, In re* (Law Rep. Eq. 432) followed - - - - 609
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—— *Maxted* v. *Paine* (1st action) (Law Rep. 4 Ex. 81) approved - - - 733
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—— *Maxted* v. *Paine* (2nd action) (Law Rep. 6 Ex. 132) commented on - - 733
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—— *Montefiore* v. *Guedalla* (1 D. F. & J. 93) distinguished - - - - 670
See Advancement.

—— *Owen* v. *Homan* (3 Mac. & G. 378) observed upon - - - - - 142
See Discharge of Surety.

—— *Palmer* v. *Flower* (Law Rep. 13 Eq. 250) distinguished - - - 727
See Failure of Purpose of Gift.

—— *Rashdall* v. *Ford* (Law Rep. 2 Eq. 750) approved - - - - 777
See Liability of Directors.

—— *Rennie* v. *Morris* (Law Rep. 13 Eq. 203) overruled - - - - 733
See Custom of Stock Exchange.

—— *Richardson* v. *Williamson* (Law Rep. 6 Q. B. 276) distinguished - - - 777
See Liability of Directors.

—— *Shelley's Case* (1 Rep. 93) followed - 398
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—— *Tench* v. *Cheese* (16 D. M. & G. 453) commented on - - - - 439
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—— *Turner, Ex parte* (3 Ves. 243) distinguished
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—— *Washoe Company* v. *Ferguson* (Law Rep. 2 Eq. 371) followed - - - 225
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—— *Wollaston* v. *Tribe* (Law Rep. 9 Eq. 44) considered - - - - 244
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COMMISSION—Army—Abolition of purchase 727
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—— Debtors Act, 1869 - - - 523
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COMMITTAL UNDER DEBTORS ACT, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4—*Order on Solicitor to pay Costs*—A common order was made against a solicitor for delivery of his bill of costs and taxation. He moved to discharge this order, and his application was dismissed with costs. He then appealed, and his appeal was also dismissed with costs:—*Held*, that the non-payment of the costs of the appeal was not a default in payment of a sum of money by a solicitor as an officer of the Court within the *Debtors Act*, 1869, s. 4, sub-s. 4, and that an attachment could not be issued against him.—Decision of the Master of the Rolls reversed. *In re* Hope - - - 523

COMMITTEE—Lunatic—Agreement for lease 229
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COMPANY—Acceptance of shares - - 587
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—— Bankrupt shareholder - - - 324
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—— Life insurance—Transfer of business 651
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COMPOSITION WITH CREDITORS—Default in payment of composition—Action by creditors - - - - 723, 724, n.
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COMPROMISE BY LIQUIDATOR—*Winding-up—Jurisdiction—Companies Act*, 1862, *s.* 160.] The Court has no jurisdiction to order the liquidator in a winding-up to consent to a compromise with a contributory.—The decision of *Malins*, V.C., reversed. *In re* East of England Banking Company. Pearson's Case - - - 309

COMPULSORY POWERS—*Railway Company—Compulsory Sale—Agreement—Specific Performance—Assignment of Lease—Covenants.*] A railway company, after notice to treat for land has been given to the landowner, and the price of the land has been fixed by arbitrators under the *Lands Clauses Consolidation Act*, is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a Court of Equity to complete the purchase.—A railway company which, after giving notice to treat, has paid the purchase-money for leaseholds, and has, with the consent of the lessee, been admitted into possession, will, at the suit of the lessee within a reasonable time, be compelled to accept an assignment containing the usual covenants.—Decree of the Master of the Rolls reversed. Harding *v.* Metropolitan Railway Company - 154

2. —— *Railway Company—Deposited Plans—Stopping up Streets—General Act—Special Act.*] A railway company deposited with the clerk of the peace plans and sections of a railway and station which they intended to obtain power to make, shewing that they proposed to stop up certain streets, but proposed to cross *Sun Street* on an arch. The Act which the company obtained referred to the plans and sections but gave the company power to stop up all the streets within a certain defined area, which included *Sun Street*:—*Held* (reversing the decision of *Bacon*, V.C.), that the company had power to stop up *Sun Street*:—*Held*, also, that the 13th and 14th sections of the *Railway Clauses Consolidation Act*, 8 Vict. c. 20, were controlled by the section in the special Act which gave power to stop up the streets within the defined area. Attorney-General *v.* Great Eastern Railway Company - - 475

CONCURRENT SUITS—Transfer to same branch of Court - - - - 517
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—— New term—Payment of interest - 587
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—— When broken—Indemnity - - 35
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CONTRACT BY CORPORATION—*Agreement not under Seal—Money demand—Part Performance—Building on the Land of another.*] The agent of a railway company made a verbal agreement with the contractor for the line, that if he would build on land of the company certain cottages more substantially than would be required for his own purposes, and would leave them for the use of

CONTRACT BY CORPORATION—*continued.*
the company, then the company would pay him £5000. The cottages were accordingly built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid £500 a year for the cottages by way of rent, with an option to the company to purchase them for £5000. This agreement was confirmed by a resolution of the board of directors. The company paid the £500 a year for some years, and then refused to pay:—*Held*, that the claim of the contractor being simply for payment of money could not be enforced in the Court of Chancery; and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money:—*Held*, also, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation for having been induced to build on the land of the company.—Order of the Master of the Rolls affirmed. Crampton *v.* Varna Railway Company - - - - - - 562

CONTRACT BY FOREIGN GOVERNMENT—*Enforcing Contract—Deposit in this Country—Payment — Certificates refused.*] Where a foreign government has made a contract in this country, and has lodged money in the hands of agents in this country for payment of the sums to become due under the contract, the Court will not refuse relief to the contractor because the contract was with a foreign government, nor because the foreign government does not appear before the Court.—Where goods are to be paid for when received, and money is lodged for payment on the production of certificates from an agent of the purchaser, the Court, if certificates are refused, may direct an inquiry and order payment of what is due to the contractor who has supplied the goods.—The French Government contracted in *England* for the purchase of a large number of cartridges, which were to be inspected, and when accepted were to be paid for through the French ambassador; and bankers in *England*, who had in their hands funds belonging to the French Government, wrote to the contractor in *England* that a special credit for £40,000 had been opened in his favour, and would be paid to him upon receipt of certificates from the French ambassador. Some cartridges were supplied and paid for, and others were delivered to agents for the French Government; but other agents of the French Government alleged that the time for the delivery had expired. Certificates were refused, and the bankers refused to make any further payments. The contractor thereupon filed his bill against the bankers and the French Government, praying to have the balance of the £40,000 brought into Court, and for an inquiry and payment. The French Government did not appear. The bankers were ordered to bring the money into Court; and the contractor was declared to be entitled to payment for all cartridges delivered under the contract; and inquiries what cartridges had been delivered were directed.—Decree of *Malins*, V.C., affirmed, with variations. Larivière *v.* Morgan - 550

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See Past Members.
—— Transfer of shares - 292, 296, n., 485
See Transfer of Shares. 1—4.

CONVERSION—*Election—Will of Married Woman—Trust of Land for Alien—Naturalization Act*, 1870 (33 *Vict. c.* 14), *ss.* 2, 18.] By an indenture, dated in March, 1862, lands were conveyed by two tenants in common, *L.* and *S.*, to a trustee upon trust to sell and to hold the proceeds in trust for *L.* and *S.* in equal shares, and as to the share of *S.* for her separate use. The indenture contained powers of exchange and partition; and it was declared that until the sale the trustee should hold the lands upon trust as to one moiety for *L.* and as to the other moiety for *S.* for her separate use.—By articles of agreement made in the following month, it was agreed that the trustee should allot the lands described in the first schedule to *L.*, and those described in the second schedule to *S.*, and should stand possessed of the allotments upon the same trusts as were by the deed of March, 1862, declared of the respective moieties, but without prejudice to the powers vested in the trustee by that indenture.—*S.* was a married woman, and her husband was an alien. By her will, made in August, 1862, she gave all her landed property situated at *E.*, being her allotment under the articles of agreement, which still remained unsold, to her husband for life, with remainder over:—*Held* (reversing the decision of *Stuart*, V.C.), that the trust for sale had been put an end to by the agreement of April, 1862; and that the property passed as real estate under the will of *S.*:—*Held*, also, that if the trust for sale had been still subsisting, *S.* had elected to take the property as real estate.—The *Naturalization Act*, 1870 (33 Vict. c. 14), s. 2, is not retrospective.—The Court of Chancery will enforce in favour of the Crown a trust of land for an alien created prior to the Act.—*Barrow* v. *Wadkin* (24 Beav. 1) approved of. Sharp *v.* St. Sauveur - - - 343

COPYHOLDS — Reservation of minerals — China clay - - - - 699
See Reservation of Minerals.

CORNWALL—Custom of—Cost book - 286
See Cost Book Company.

CORPORATION—Contract not under seal - 562
See Contract by Corporation.
—— Town Improvement Commissioners—Bonds
See Corporation Bonds. [655

CORPORATION BONDS — *Right to Payment — Payment by Lot—Receiver.*] By an Act of Parliament, Commissioners were appointed, who were to expend money in improving a town;

CORPORATION BONDS—*continued.*
they were authorized to levy rates on the town and to borrow money on the security of the rates, giving bonds for the money so borrowed, of which £100 at the least should be chosen by lot, and paid off every year. Interest on the bonds had been duly paid, and, except in two years, £100 had been paid off every year, but above £15,000 remained on the security of the bonds:—*Held* (affirming the decision of *Bacon*, V.C.), that holders of bonds to the amount of £800 were not entitled to immediate payment out of the rates or to a receiver of the rates, PRESTON *v.* CORPORATION OF GREAT YARMOUTH - - - - 655

COST-BOOK COMPANY—*Custom of Cornwall.*] A shareholder in a Cornish mine worked on the cost-book system, relinquished his shares in July, 1868, and paid his share of the expenses up to his retirement. In August, 1869, an order for winding up the company was made, and the retired shareholder claimed to prove as a creditor for the value of his share of the stock and plant. The assets were insufficient to pay the creditors of the mine. It having been found by a jury that, according to the custom of *Cornwall*, an adventurer in a cost-book mine, upon relinquishing his shares and discharging his proportion of the liabilities of the company at that date, is entitled to be paid his share of the then value of the stock and plant, and that such share is due to him immediately, and payable within two years, the proof was admitted. *In re* PROSPER UNITED MINING COMPANY. *Ex parte* PALMER - - - 286

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—— Security for—Cross-suit—Bill by company being wound up - - - 225
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—— Transfer of suits - - - 517
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—— Trustee Relief Act—Income and corpus 609
See TRUSTEE RELIEF ACT.

—— Uncertificated solicitor - - - 766
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COUNSEL'S FEES—Costs of three counsel—When allowed - - - - 48, 513
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CREDITOR—Extraordinary resolution of creditors —Liquidation by arrangement - 526
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—— Secured—Proof by—Bankruptcy - 760
See CREDITOR HOLDING SECURITY.

CREDITOR HOLDING SECURITY—*Creditors' Deed —Liquidation Act* (1868)—*Bankruptcy—Subsequent Interest—Valuation.*] A debtor executed an inspectorship deed under the *Bankruptcy Act*, 1861. A Judge in Chancery, acting under the *Liquidation Act*, 1868, ascertained the value of the securities held by the secured creditors, which value the creditors were to take in discharge of their debts, and to be allowed to prove for the deficiency:—*Held*, that the rule in bankruptcy prevailed, and that the value so ascertained must go in reduction of the principal and interest due to the secured creditors at the date of the inspectorship deed, and to be proved for by the creditors, and could not be applied by the creditors in the first place towards payment of interest accrued on their debts since the date of the inspectorship.—Decision of *Bacon*, V.C., reversed. *In re* SAVIN - - - - - 760

CREDITORS' DEED—Not executed by creditors—Right of trustee to sue strangers - 71
See TRUSTEE OF CREDITORS' DEED.

—— Opening accounts—Overcharges—Jurisdiction - - - - - - 61
See BANKRUPTCY JURISDICTION. 1.

—— Secured creditor—Interest—Liquidation Act, 1868 - - - - - - 760
See CREDITOR HOLDING SECURITY.

CROSS-REMAINDERS BY IMPLICATION—*Will —Construction—Issue.*] A testator gave his residuary personal estate upon trust to pay the income equally between his three daughters, *F.*, *E.*, and *C.*, during their respective lives; and if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying, in equal shares; and if only one such daughter should die leaving issue, then in trust to pay and apply the whole residue equally amongst the issue of such one daughter; but if all the daughters should die without leaving issue, then over. *C.* died leaving issue, and afterwards *F.* died without leaving issue:—*Held* (reversing the decision of *Wickens*, V.C.), that cross-limitations were to be implied between the daughters and their families, and that the issue of each daughter were, for all purposes, to be ascertained at her own death; and that therefore one moiety of *F.'s* share was payable to the issue of *C.* living at *C.'s* death, and the other moiety went by way of accretion to *E.'s* original share. *In re* RIDGE'S TRUSTS - - - - 665

CROSS-SUIT—Security for costs—Bill by company being wound up - - - 225
See SECURITY FOR COSTS.

CROWN—Rights of—Trust of land for alien 343
See CONVERSION.

CUMULATIVE GIFT—*Legacies—Two Codicils—Evidence—Letter from Solicitor to Testator.*] A testator, by codicil, gave legacies of various amounts to nine legatees, and a year's wages to every one of his servants. He afterwards made a second codicil, which was substantially a copy of the former, except as follows:—One of the legatees named in the first codicil was not named in the second—three of the legacies given by the second codicil were less than those given by the first to the same persons—one legacy was given by the second codicil to a person not named in the first—the gift to servants by the second codicil was of "a year's wages liberally interpreted," and the second codicil contained a direction for payment of duty on legacies:—*Held* (affirming the decision of *Bacon*, V.C.), that the case was not taken out of the general rule that the gift of a legacy by a subsequent instrument to a person who takes a

CUMULATIVE GIFT—*continued.*
legacy under an earlier instrument is cumulative and not substitutionary:—*Held*, also, that a letter written to the testator by his solicitor advising him to recopy his first codicil was inadmissible. Wilson *v.* O'Leary - - - - - 448

CUSTOM—Cornish mines—Cost-book - 286
See Cost-book Company.

—— Stock Exchange - - - 733
See Custom of Stock Exchange.

CUSTOM OF STOCK EXCHANGE—*Sale of Shares—Infant Transferee—Liability of Jobber.*] The Plaintiff, through his stockbroker, contracted with the Defendant, a jobber on the *Stock Exchange*, for the sale of fifty shares in a company. On the name day the Defendant gave in to the Plaintiff's brokers a ticket with the name of *L.* as the intending purchaser, which had been passed to him by another jobber. A transfer to *L.* was accordingly executed by the Plaintiff; but it was afterwards discovered that *L.* was an infant, and the transfer was never registered. In a suit by the Plaintiff against the Defendant for an indemnity against calls:—*Held* (reversing the decision of *Bacon*, V.C.), that the Defendant, not having given the name of a transferee who was capable of accepting the transfer, was not discharged from liability, although the ten days limited by the rules of the *Stock Exchange* for objecting to a proposed transferee had expired before the execution of the transfer.—*Maxted* v. *Paine* (1st action) (Law Rep. 4 Ex. 81) approved.—*Rennie* v. *Morris* (Law Rep. 13 Eq. 203) overruled.—Observations on the judgment of *Blackburn*, J., in *Maxted* v. *Paine* (2nd action) (Law Rep. 6 Ex. 132).—In sales of shares on the *Stock Exchange* the ultimate contract is not between the vendor's broker and the purchaser's broker, but between the vendor and the purchaser named on the ticket, who are brought together by means of the jobber; and therefore, until a person is named who is capable of contracting, and who has given authority for the use of his name, the jobber is not discharged from liability to the vendor. Merry *v.* Nickalls - - - - - 733

CY-PRÈS—Impracticable object—Gift to endow future church - - - 232
See Mortmain.

DEATH—Plaintiff in suit—Appointment of representative - - - - 634
See Appointment of Representative.

—— Presumption of - - - 120
See Presumption of Death.

DEBTOR SUMMONS—*Bankruptcy Act*, 1869, *s.* 7—*Security.*] Where a person served with a debtor summons disputes the debt, the Court, in determining whether the alleged debtor must give security under the *Bankruptcy Act*, 1869, *s.* 7, will have regard not only to the state of the debtor's pecuniary circumstances, but to the probability of the claimant being able to establish the debt. In a case, therefore, where it appeared extremely doubtful whether the claim could be substantiated at law, the Court of Appeal discharged an order directing the debtor to give security, though it was admitted that he was in very poor circumstances. *Ex parte* Wier. *In re* Wier - - - - - 319

DECREE—Inrolment of—Vacating - 217
See Vacation of Inrolment.

DEED—Married woman—Deed acknowledged, but not in form of conveyance—Separate estate - - - - 64
See Acknowledgment by Married Woman.

—— Obtained by fraud—Negligence - 75
See Priority from Negligence.

—— Obtained by fraud—Negligence - 79, n.
See Deed obtained by Fraud.

—— Obtained by undue pressure - 704
See Undue Pressure.

DEED OBTAINED BY FRAUD—*Fraud of Solicitor—Forged Signature.*] An annuity was settled on a mother for life, and after her death on her daughters. Their solicitor prepared a deed by which the life interest of the mother and the reversion of one of the daughters was mortgaged to *A.* He then induced the daughter to execute the deed by misrepresenting the effect of the deed, and by forging the name of her mother to it. The solicitor received and misapplied the mortgage money:—*Held*, on a bill by the mother and daughter against *A.*, that the deed must be set aside. Lee *v.* Angas - - 79, n.

DEFEATING AND DELAYING CREDITORS—*Act of Bankruptcy—"Absenting himself"—Intent to defeat or delay Creditors—Bankruptcy Act*, 1869, *s.* 6, *sub-s.* 3—*Failure to keep Appointment with Creditor.*] A debtor promised to call at an appointed time on a creditor and pay the debt. Having failed to procure the money he did not call; but he was to be found at his own place of business:—*Held* (affirming the decision of the Registrar), that the failure to keep the appointment did not constitute an absenting himself with intent to defeat or delay the creditor, and that no act of bankruptcy had been committed. *Ex parte* Meyer. *In re* Stephany - - - 188

DELAY—Setting aside deed—Undue influence 329
See Voluntary Settlement. 2.

DEPOSITED PLANS—Railway company—Stopping up street - - - 475
See Compulsory Powers. 2.

DESCRIPTION OF TRANSFEREE—"Gentleman" [292, 296, n.
See Transfer of Shares. 1, 2.

DIRECTORS—Breach of trust by building society [427
See Building Society.

—— Delegation of power to committee - 587
See Acceptance of Shares.

—— Liability of - - - - 777
See Liability of Directors.

—— Unauthorized dealing in shares—Rigging the market—Notice - - 161
See Unauthorized Dealing in Shares.

DISCHARGE OF SURETY—*Principal and Surety—Giving Time.*] The holder of a security who agrees with the principal to give time to the surety by so doing discharges the surety.—The holder of a security is, in dealing with the security, affected by knowledge acquired after taking the security as to which of the parties liable on the security is the principal and which is the surety.—A financial company, by agreement with an agent, accepted bills of exchange

DISCHARGE OF SURETY—*continued.*

which were discounted for the agent by a discount company, the agent guaranteeing payment. The discount company were not at the time aware of the relations between the acceptors and the agent, but were informed before the bills matured that the agent was principal, and that the acceptors were sureties. After this the discount company agreed with the agent not to press the acceptors for payment until certain other bills became due:—*Held*, that the acceptors were thereby discharged.—Decree of *Malins*, V.C., reversed.—*Owen* v. *Homan* (3 Mac. & G. 378) and *Ex parte Graham* (5 D. M. & G. 356) observed upon. Oriental Financial Corporation *v.* Overend, Gurney, & Co. - - - - - - - 142

DISCLAIMER BY TRUSTEE IN BANKRUPTCY—*Lease—Proof by the Lessor for Injury—Bankruptcy Act*, 1869, *s.* 23.] The owners of certain houses entered into an agreement with *H.* to grant him a lease of the premises for ten years, at an annual rent of £500. After the first year *H.* filed a petition for liquidation by arrangement. The trustee under the liquidation disclaimed the agreement under the 23rd section of the *Bankruptcy Act*, 1869; and the lessors claimed to prove as creditors for the injury they had sustained "by the operation of the section":—*Held* (reversing the decision of the Registrar), that they were entitled to prove under the section; and that the measure of the injury sustained was the difference between the rent to be paid under the agreement and what they could now obtain for the property.—The Registrar, sitting as Chief Judge, ought not to decide points of novelty and difficulty, but should reserve them for the opinion of the Chief Judge. *Ex parte* Llynvi Coal and Iron Company. *In re* Hide - - - - - 28

DISCOVERY—Injurious to Defendant 90, 94, n.
See Discovery injurious to Defendant. 1, 2.

—— Production of documents - 207, 312, 686
See Production of Documents. 1, 2, 3.

DISCOVERY INJURIOUS TO DEFENDANT — *Practice—Production of Documents.*—Although, in considering whether the rule that a Defendant who submits to give discovery must make full discovery is to be applied, the Court does not in general weigh nicely the materiality of the discovery sought, still, if the discovery is such as might be used for purposes prejudicial to the Defendant irrespective of the suit, the Court will look narrowly to the question whether there is a reasonable prospect of its being of material service to the Plaintiff at the hearing.—The Defendants in a suit to restrain infringement of trade-marks having sealed up certain parts of entries and letters admitted to relate to the matters in question in the cause, were ordered by the Duchy Court of *Lancaster* to unseal the names of customers, and of places, and the prices, forming parts of such entries, and to unseal the portions of letters and copies of letters which contained the names of the writers and of the persons to whom the letters which were copied were sent, and the places to and from which the letters were sent, and the description of the marks to be placed, or which had been placed, on the goods referred to in such letters:—*Held*, on appeal, that the Defendants ought not to be compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices, inasmuch as such discovery might be used in a manner prejudicial to the Defendants in their trade, and was not likely to assist the Plaintiffs in making out their case at the hearing; but that the order of the Vice-Chancellor was in other respects right. Carver *v.* Pinto Leite - 90

DISCOVERY INJURIOUS TO DEFENDANT — *continued.*

2. —— Where the discovery sought may be prejudicial to the Defendant independently of the suit, the Court will carefully consider whether it is really material to the Plaintiff. In a suit in which the Defendant was charged with selling goods as agent of the Plaintiffs, the Court refused to make the Defendant set out in his answer the names of his customers. Moore *v.* Craven 94, n.

DISCRETION—Power of sale in trustees—Exoneration of personalty - - 439
See Exoneration of Personalty.

DISTRICT—Endowed schools—Exhibition to university - - - - 500
See Endowed Schools Commissioners.

DOCUMENTS—Production of 207, 312, 686
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—— Production of—Discovery injurious to Defendant - - - - 90, 94, n.
See Discovery injurious to Defendant. 1, 2.

DOMICIL—Legacy duty—Rent-charge - 192
See Legacy Duty.

DOUBLE PORTIONS—Advances to widow 670
See Advancement.

DOUBLE PROOF—Bankruptcy—Joint and several—Prommissory note - - 178
See Proof for Joint and Several Contract.

—— Estate — Administered in two countries
See Bankruptcy in two Countries. [490

—— Winding up—Bill of Exchange - 99
See Letter of Credit.

DURATION OF AGREEMENT—*Railway—Purposes of Railway—Evidence that Land is required.*] A landowner agreed with a railway company to sell them ten acres of land and one acre for a station, at a certain price, and that if the company should require more land for the station, or for any purpose, they should pay for the same at the rate of £100 per acre, and the agreement was to be supplemental to the *Lands Clauses Act.* The ten acres were paid for and conveyed. Before the compulsory powers of the company had expired they gave (apparently by mistake) notice to treat for three acres more, and before the time for completion had expired they took possession of these three acres, alleging that they required the land. They also took possession of some small pieces of land which were covered by earth slipped from the railway:—*Held*, that, under the agreement, the company had power, until the expiration of the time limited for the completion of the railway, to take such land as they required for the purpose of a station or for slips of earth at £100 an acre.—The Court will accept as conclusive the evidence of the engineer in the service of the company as to the quantity

DURATION OF AGREEMENT—*continued.* of land required for the purposes of the railway, if the statement has a reasonable appearance of accuracy.—Decree of *Bacon*, V.C., reversed. Kemp v. South Eastern Railway Company - 364

ECCLESIASTICAL COMMISSIONERS—*Practice—Chancery or Lunacy—23 & 24 Vict. c. 124, s. 38.*] Where the interest under a lease made by an ecclesiastical corporation is vested in trustees without power of sale, and the person entitled to the rents is, through unsoundness of mind, incapable of consenting to a sale, the order sanctioning such sale is to be made in Chancery and not in Lunacy. *In re* Cheshire - - - 50

ELECTION — Doctrine of — Conversion — Will of married woman - - - 343
See Conversion.

EMBARRASSING CHANCERY SUIT—Ground for annulling bankruptcy - - 532
See Annulling Adjudication.

ENDOWED SCHOOLS COMMISSIONERS—32 & 33 *Vict. c.* 56, *ss.* 5, 14—*Exhibitions—College—District.*] The Endowed Schools Commissioners have power to inquire into the endowment of exhibitions at a college in an university, whenever they are restricted to a school or district.—*Wales* is a district within the meaning of the *Endowed Schools Act.*—Decision of *Wickens*, V.C., affirmed. *In re* Meyricke Fund - - - 500

ENFRANCHISEMENT—Reservation of minerals
See Reservation of Minerals. [699

ENGINEER—Evidence of—Land is required by railway - - - - 364
See Duration of Agreement.

EQUITABLE ASSIGNMENT—Bill drawn against cargo - - - - 695
See Bill drawn against Cargo.

EQUITABLE DEFENCE—Adjudication of bankruptcy - - - - 532
See Annulling Adjudication.

EQUITABLE ESTATE—Rule in *Shelley's Case*
See Rule in Shelley's Case. [398

ESTATE PUR AUTRE VIE—Legacy duty 192
See Legacy Duty.

ESTOPPEL—Recital in deed by married woman
See Solicitor's Lien. [773

EVIDENCE—Affidavit without jurat - 488
See Affidavit without Jurat.

—— Letter from solicitor to testator - 448
See Cumulative Gift.

—— Pedigree—Production of documents - 686
See Production of Documents. 3.

—— Presumption of death - - - 120
See Presumption of Death.

—— Statement to discredit witness - 395
See Statement to discredit Witness.

EXECUTION—Creditors' deed—Allegation of [71
See Trustee of Creditors' Deed.

—— Deed—Fraud of solicitor - - 79, n.
See Deed obtained by Fraud.

—— Deed—Fraud of solicitor - - 75
See Priority from Negligence.

—— Seizure and sale - - - 314
See Execution Creditor. 1.

—— Sum exceeding £50 - - 325, 732
See Execution Creditor. 2, 3.

EXECUTION CREDITOR—*Bankruptcy Act*, 1869, *s.* 12—*Seizure and Sale.*] A warrant of *fi. fa.*, on a County Court judgment, was delivered to the bailiff of a County Court to be executed. Later on the same day the debtor filed a petition for liquidation, and a receiver was appointed. The bailiff, on coming to the debtor's house to execute the warrant, found the receiver in possession:—*Held* (affirming the decision of the Chief Judge, who had reversed the decision of the County Court), that the trustee under the liquidation was entitled to the goods as against the execution creditor; for that, under the *Bankruptcy Act*, 1869, s. 12, goods are not, as against a trustee in bankruptcy, bound by a writ of *fi. fa.* from the delivery of the writ to the sheriff; but a seizure of them before the act of bankruptcy is necessary. *Ex parte* Williams. *In re* Davies - - 314

2. —— *Bankruptcy—Trader— Execution for more than £50—Petition for Liquidation after Seizure and before Sale—Bankruptcy Act*, 1869, *s.* 87.] The goods of a trader having been taken in execution for a debt exceeding £50, he on the following day presented a petition for liquidation by arrangement, under which resolutions for liquidation were come to and a trustee appointed. The execution creditor claimed the benefit of his execution, on the ground that the seizure alone was not an act of bankruptcy, and that no sale had taken place when the petition was presented:—*Held* (affirming the decision of the Chief Judge), that the trustee was entitled to the goods. *Ex parte* Rayner. *In re* Johnson - - 325

3. —— *Execution for Sum exceeding £50—Bankruptcy Act*, 1869, *s.* 87.] Judgment having been entered up against a trader for £48 19*s.*, the sheriff levied and sold goods of the debtor to the amount of £50 11*s.*, being the amount of the judgment, with £1 12*s.* for the costs of the execution:—*Held* (affirming the decision of the Chief Judge), that the goods had "been taken in execution in respect of a judgment for a sum exceeding £50 and sold" within the meaning of the *Bankruptcy Act*, 1869, s. 87; and that the proceeds must be paid to the trustee in bankruptcy, and not to the execution creditor. *Ex parte* Liverpool Loan Company. *In re* Bullen - 732

EXECUTOR—Loan to, by bankers - - 123
See Bankers' Account.

—— Tenant for life—Waste—Account - 676
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EXECUTORY SETTLEMENT — Estate without impeachment of waste—Married woman
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See Endowed Schools Commissioners.

EXONERATION—Partnership property—Specific legacy - - - - 1
See Bequest of Share of Partnership Property.

—— Personal estate - - - - 439
See Exoneration of Personalty.

EXONERATION OF PERSONALTY—*Will—Legacies charged on Real Estate—Discretion in Trustees to sell—Mixed Fund of Realty and Personalty.*] In order that legacies charged upon real estate may be payable out of the real and personal estate *pro ratâ*, it is not necessary that the testator

EXONERATION OF PERSONALTY—*continued.*

should have directed an absolute conversion of the real estate. It is sufficient that he has shewn an intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid.—Therefore, where a testator had empowered his trustees to sell his real and personal estate in case and as often as they should think fit, and had directed them to pay certain legacies out of the residue of his real and personal estate, and the moneys arising from the sale thereof:—*Held* (affirming the decision of *Bacon*, V.C.), upon the construction of the whole will, that the legacies were payable *pro ratâ* out of the real and personal estate.—*Tench* v. *Cheese* (6 D. M. & G. 453) commented on. ALLAN *v.* GOTT - - 439

EXPRESS TRAINS—*Railway Company—Stopping Trains—Control.*] A railway company covenanted with the builders of refreshment rooms at a station on the line of railway that all trains which should pass the station carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, should stop for a reasonable period of about ten minutes. The Postmaster-General, proceeding under an Act of Parliament which was passed before the covenant was made, required the company to run a train carrying mails at a certain hour, and stopping at the station for five minutes only:—*Held* (reversing the order of *Wickens*, V.C.), that such a train was a train "not under the control of the company" within the meaning of the exception. PHILLIPS *v.* GREAT WESTERN RAILWAY COMPANY - - - - - 409

EXTINCTION OF POWER—*Power of Sale—Mortgage—Transfer of Mortgage.*] In 1825 *D.* mortgaged an estate to *I.* in fee (subject, among other incumbrances, to an existing mortgage for £3000) to secure £27,000 payable at the end of twelve months, witb interest in the meantime. The mortgage deed contained a power of sale providing that if default should be made in payment of the interest, or any part of it, for a month after any of the days appointed for payment, or in payment of the principal on the appointed day, then at any time thereafter, though no advantage should have been taken of any previous default, *I.*, his heirs or assigns, might sell. In 1830, *I.* having called for payment, a deed of transfer was executed to *K.* and *R.* This deed, after reciting that *I.* was entitled to the prior mortgage for £3000, recited the mortgage of 1825, and that "in the now reciting indenture a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be exercised," and recited the calling in of the mortgage moneys, and that *D.* had applied to *K.* and *R.* to discharge them, "which *K.* and *R.* have agreed to do on having the said sums so agreed to be advanced as aforesaid secured to them by an assignment of the said several securities hereinbefore recited, and generally in the manner hereinafter appearing." Then, in consideration of £30,000 paid to *I.* by *K.* and *R.*, *I.*, at the request of *D.*, assigned, and *I.* confirmed to *K.* and *R.*, the moneys due on the mortgages, "and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained." Then *I.* conveyed and *D.* confirmed to *K.* and *R.* in fee the mortgaged estates subject to a proviso for redemption if *D.* should pay the principal of £30,000 on the day therein named, being at the expiration of seven years, and should in the meantime pay interest half-yearly on the days therein named. It was agreed that the money should remain on the security for seven years, *D.* not to be at liberty to pay it off sooner, and *K.* and *R.* not to call for payment sooner, unless default was made in payment of interest, or *D.* died. There was a power of sale to arise if default should be made in payment of the principal or interest contrary to the terms of the proviso for redemption; and a covenant by *K.* and *R.* that no sale of the property should be made without three months' notice. The persons claiming under *K.* and *R.* having put up the property for sale, the purchasers objected that the power of sale in the deed if 1825 was gone, and that the vendors could not make a good title as against mesne incumbrancers:—*Held* (reversing the decision of the Master of the Rolls), that the power of sale in the mortgage of 1825 was still subsisting, and capable of being exercised. BOYD *v.* PETRIE - - - - - - - 385

EXTRAORDINARY RESOLUTION OF CREDITORS—*Bankruptcy—Liquidation by Arrangement—Direction to transfer Proceedings to another Court—Filing and Registration of Proceedings—Stamps—Bankruptcy Act*, 1869, *s.* 126—*Bankruptcy Rules*, 1870, *rr.* 206, 284, 288.] An extraordinary resolution of creditors presented to a Registrar, under the *Bankruptcy Act*, 1869, s. 126, must have the proper stamp affixed, and must be accompanied by the affidavit required by Rule 284 of the Bankruptcy Rules, 1870, verifying the statement of proofs and proxies; otherwise it cannot be received by the Registrar, either for the purpose of filing or of registration.—A direction to transfer the proceedings to another Court, under Rule 288 of the Bankruptcy Rules, 1870, is part of the resolution in which it is inserted, and has no validity till such resolution has been registered. *Ex parte* DAVIS. *In re* DAVIS - 526

FAILURE OF PURPOSE OF GIFT—*Settlement—Advancement—Abolition of Purchase of Commissions in Army—Regulation of Forces Act*, 1871 (34 & 35 *Vict. c.* 86).] By a separation deed a sum of money was directed to be held by trustees upon trust for the wife for life, and after her death, as to four-sixth parts thereof, for *F. W.*, one of the children of the marriage, who was then an officer in the army, during his life, and after his death for his children. And it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding £2000, in or towards effecting the promotion of *F. W.* in the army. The trustees applied £850 in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army, under the Royal Warrant of the 20th of July, 1871, no further sum could be applied for the same purpose:—*Held*, that the purpose for

FAILURE OF PURPOSE OF GIFT—*continued.* which the power was given to the trustees having failed, the residue of the sum of £2000 could not be raised and applied in any manner for the benefit of *F. W.*—*Palmer* v. *Flower* (Law Rep. 13 Eq. 250) distinguished. *In re* Ward's Trusts [727

FOREIGN GOVERNMENT—Contract with 550
See Contract by Foreign Government.

FOREST—Right of common in - - 456
See Right of Common.

FORFEITURE CLAUSE — *Will—Bankruptcy—Words of Futurity.*] A testatrix, knowing that her husband was bankrupt, gave by her will a life annuity to her husband, subject to a proviso that if he should become bankrupt or should assign the annuity, then it should cease, and subject to a further proviso, that it should be lawful for the trustees of her will at any time to refuse payment of the annuity, which in that case was to go over:—*Held* (reversing the decision of *James*, V.C.), that the existing bankruptcy operated as a forfeiture of the annuity, notwithstanding the words of futurity in the will and the discretion given to the trustees. Trappes *v.* Meredith - - 248

FORGED TRADE-MARK - - - 130
See Trade-mark. 1.

FRAUD—Execution of deed—Solicitor - 75
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—— Execution of deed—Solicitor - 79, n.
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—— Trade-mark—Misrepresentation - 611
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FRAUDS, STATUTE OF—Agreement by letters 406
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—— Defence of, to cover fraudulent act - 469
See Resulting Trust.

FRAUDULENT PREFERENCE—*Bankruptcy Act*, 1869, *s.* 92.] A payment by a bankrupt to a creditor, shortly before his bankruptcy, being impeached as a fraudulent preference, the case was tried before a jury, to whom the points submitted were:—1. Whether the bankrupt, when he made the payment, was unable to pay his debts as they became due; 2. Whether he made it with a view to give that creditor a preference over his other creditors; and, 3, Whether the payment was made by the bankrupt voluntarily and without real pressure, bankruptcy being reasonably imminent. The jury found in the affirmative on the first and third points, and in the negative on the second. On these findings the County Court Judge ordered the money paid to be refunded; but the Chief Judge reversed this decision:—*Held*, on appeal, that the decision of the Chief Judge was right, for that the jury having found as a fact that the payment was not made with a view to giving the creditor a preference, and no proceedings being taken to set aside their verdict, this finding disposed of the whole case, and the finding on the third issue was immaterial, that issue being calculated to mislead the jury. *Ex parte* Bolland. *In re* Cherry - - - - - 24

FREIGHT—Lien on—Mortgage of ship - 507
See Mortgage of Ship.

FUTURE CHURCH—Endowment of—Mortmain
See Mortmain. [232

FUTURE HUSBAND—*Will—Construction—Gift to Husband of Unmarried Daughter—Word "Unmarried"—Vesting—Doubtful Title—Specific Performance.*] A testator gave his estates to trustees upon trust to pay the rents to his two daughters (both then unmarried) in equal shares during their respective lives, "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry;" and after their respective decease, upon trust to convey the estates "unto and equally between the respective husbands of them, my said daughters, to hold to them respectively, and their respective heirs and assigns;" with a proviso, that if either of his daughters should "depart this life unmarried," her share should go to the survivor for her life, and on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—*Held* (reversing the decision of *Wickens*, V.C.), that the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasibly vested remainder in fee to her first husband. And that, as the question turned on a general rule of construction, unaffected by any special context in the will, the title would be forced on a purchaser. Radford *v.* Willis - - - - 7

FUTURITY—Words of—Forfeiture clause—Past bankruptcy - - - - 248
See Forfeiture Clause.

GENERAL LINE OF BUILDINGS—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict.* c. 102), *ss.* 74, 75—*Vacant Ground—Buildings pulled down by a Railway Company—Jurisdiction—Injunction.*] The 75th section of the *Metropolis Management Amendment Act*, 1862, does not apply to ground formerly covered with buildings, unless the owner has relinquished his right of rebuilding on the same site. If, therefore, the District Board of Works threatens to proceed under the 75th section to demolish houses which are being rebuilt on an old site, on the ground that they are beyond the general line of buildings, it is acting *ultrà vires*, and may be restrained by the Court of Chancery. In such a case the Metropolitan Board ought to proceed under the 74th section of the same Act, which provides for compensation to the landowners.—A railway company took land covered with houses, and pulled down the houses for the purpose of constructing their railway, and then sold the land as building ground to the Plaintiff:—*Held* (affirming the decision of *Malins*, V.C.), that the Plaintiff had not lost the right to rebuild the houses on the same site as that occupied by the houses before they were pulled down; and that for this purpose the yard of a house was held to be equivalent to a house.—In determining the general line of buildings of a street the architect of the Metropolitan Board of Works ought to have regard to the frontage of houses previously existing, and which may be rebuilt, as well as to those still standing. Lord Auckland *v.* Westminster Local Board of Works - - - 597

GENERAL RULES IN BANKRUPTCY, 1870—Rule 140, Form 45 - - 662
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—— Rule 143 - - - - - 730
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—— Rules 206, 284, 288 - - - 521
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GENERAL AND SPECIAL ACT—Railway company - - - - - 475
See COMPULSORY POWERS. 2.

GIFT BY IMPLICATION—*Will—Construction—Directions to settle on Marriage under Twenty-one—Special Case.*] A testator directed that his trustees should hold certain personal property in trust for his daughter *S.*, until his granddaughter *M. S.* should attain twenty-one, or marry under that age with the consent of her guardians; and when his said granddaughter should attain twenty-one, or before, upon her marriage with such consent, upon trust to pay the income to his said granddaughter for her life for her separate use; and in case of her marriage with such consent, but not otherwise, the property was to be settled on her for life for her separate use, with remainder to her children, and in default of issue, to be at her absolute disposal.—The testator gave other property on like trusts for his other granddaughters, and referred to the property as the "provisions" and the "portions" of his granddaughters. Then followed a gift over on the death of any granddaughter under twenty-one, and without having been married, upon trust for the others in like manner as their original portions; and if all should die under twenty-one, and without having been married, then the shares were to fall into the residue. Two of the granddaughters attained twenty-one, but were still unmarried:—*Held* (affirming the decision of *Wickens*, V.C.), that there was no absolute interest given by implication to the granddaughters on their attaining twenty-one without being married; but that they had only an estate for life, subject to any question which might arise in case either of them married. SAVAGE *v.* TYERS - - 356

GIFT TO WIFE AND CHILDREN—*Will—Gift to a Wife for the Benefit of Herself and her Children.*] A testator gave all his real and personal estate to his wife for the use and benefit of herself and all his children, whether born of his former or of his then present wife, and he appointed his wife and three other persons his executors:—*Held* (reversing the decision of *Malins*, V.C.), that the wife and children took as joint tenants. NEWILL *v.* NEWILL [253

GIVING TIME—Principal and surety - 142
See DISCHARGE OF SURETY.

HIGHWAY, SOIL OF—Right of adjoining landowners - - - - - 421
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HOUSE OF COMMONS—Member—Bankruptcy
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See ACKNOWLEDGMENT BY MARRIED WOMAN.

—— Present or future husband—"Unmarried" 7
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—— Recital in deed by married woman—Estoppel
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—— Separate estate—Power of wife over - 64
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—— Settled Estates Act—Consent of married woman—Infant - - - 323
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ILLEGALITY—Pleading—Sufficiency of allegation
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IMPEACHMENT OF WASTE—*Married Woman—Restraint on Anticipation.*] A testator devised his residuary real estate to his trustees in trust for his granddaughter *P.* in fee at twenty-one or marriage, and directed that if she should marry under twenty-one his trustees should settle the real estate on her for life for her separate use, without power of anticipation, with remainder to her children as tenants in common in tail; and he authorized his trustees to give a life estate to his granddaughter's husband, to commence after her decease, and to be either with or without impeachment of waste:—*Held*, that the life estate given to the granddaughter must not be without impeachment of waste; such an estate being inconsistent with the restraint on anticipation. CLIVE *v.* CLIVE - - - - - - 433

IMPERFECT DESCRIPTION OF CHARITY—*Will—Latent Ambiguity—Parol Evidence—Legacy to Charitable Society, or for Charitable Object.*] A testatrix, by will made in 1868, gave a legacy to "the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of *Worcester*, to be applied by him for the benefit of that charity." Two societies made a claim. One had been founded in 1777 for the relief of the widows and orphans of the clergy of the diocese, at which time the diocese comprised only the Archdeaconry of *Worcester*. In 1837 the Archdeaconry of *Coventry* was added to the diocese, and in 1848 the *Worcester* society altered its title, so as to shew that its operations were restricted to the Archdeaconry of *Worcester*. The other society had been founded in 1777 for the relief of widows and orphans of clergy in the Archdeaconry of *Coventry*. The father of the testatrix had been a subscriber to the *Worcester* society till his death in 1817. His widow had continued the subscription till her death in 1860. And the testatrix had continued it from that time at an increased rate; but it did not appear that the testatrix, or any of her family, had subscribed to the *Coventry* society:—*Held*, by *Malins*, V.C., that the gift was to be treated as a gift to an object, not to a particular society, and must be apportioned between the two societies:—*Held*, on appeal, that the gift was a gift to a particular society, with a slight inaccuracy of description, and that the *Worcester* society was solely entitled. *In re* KILVERT'S TRUSTS - - - - - - 170

IMPLICATION—Cross-remainders - - 665
See CROSS-REMAINDERS BY IMPLICATION.

IMPLICATION—*continued.*

—— Direction to settle on marriage under twenty-one — Attaining twenty-one without marrying - - - - 356
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INCOME AND CORPUS—Costs of trustee—Trustee Relief Act - - - - 609
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INDEMNITY—Contributory—Trustee and *cestui que trust*—Suit by liquidator - - 395
See Official Liquidator.

—— Proof for, in bankruptcy—Contract, when broken - - - - - 35
See Proof for Contingent Liability.

INFANT—Settled Estates Act—Consent - 323
See Settled Estates Act.

—— Transferee of shares—Ratification - 115
See Infant Transferee.

—— Transfer of shares—Broker's ticket - 733
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INFANT TRANSFEREE — *Contributory* — *Repudiation* — *Ratification.*] In October, 1865, *C.* purchased shares in a company, and had them transferred to *B.* as a trustee for him, and *B.'s* name was put on the register. In March, 1866, the company was ordered to be wound up. At the time of the transfer *B.* was an infant, and he did not come of age till September, 1867. In December, 1867, *B.'s* name was settled on the list of contributories; and in January, 1868, a call was made, notice of which was sent to *B.* On receipt of the notice *B.* repudiated the shares, and the official liquidator took out a summons to remove his name from the list, but afterwards abandoned the summons. In April, 1871, *B.*, at the request of the official liquidator, wrote a letter authorizing him, in consideration of his not proceeding against *B.* under the call, to use *B.'s* name in taking proceedings against *C.*, the real owner of the shares. Afterwards *B.* took out a summons to have his name removed from the list of contributories:—*Held* (affirming the decision of the Master of the Rolls), that the letter of April, 1871, did not operate as a retraction of *B.'s* repudiation of the shares; and that his name must be removed from the list of contributories. *In re* Contract Corporation. Baker's Case - - - 115

INJUNCTION—Bankruptcy - 20, 723, 724, n.
See Injunction in Bankruptcy. 1, 2, 3.

—— Pulling down buildings—Board of works
See General Line of Buildings. [597

—— "Threaten and intend" - - 699
See Reservation of Minerals.

—— Trade-mark - - - 130, 611
See Trade-mark. 1, 2.

INJUNCTION IN BANKPUPTCY—*Bill of Sale.*] The Court of Bankruptcy has power to restrain a creditor from bringing against the trustee under a liquidation an action upon a bill of sale given by the debtor, the validity of which is disputed by the trustee. *Ex parte* Cohen. *In re* Sparke 20

2. —— *Composition with Creditors—Default in payment of Instalment—Action.*] Where, by resolutions under the *Bankruptcy Act*, 1869, the creditors agreed to accept a composition payable by instalments, and the debtor made default in payment of an instalment to a creditor:—*Held* (reversing the decision of the Registrar), that the creditor could maintain an action against the debtor for the balance of the whole debt remaining unpaid, and would not be restrained by the Court of Bankruptcy. *In re* Hatton 723

3. —— *Liquidation by Arrangement—Default in payment of Composition.*] A debtor, who had entered into arrangement with his creditors under the *Bankruptcy Act*, 1869, to pay a composition on his debts, failed to pay the composition to one of the creditors. The creditor brought an action for the whole amount of the debt in the County Court:—*Held*, that the Court of Bankruptcy could restrain him from recovering more than the amount of the composition and costs. *In re* Hemingway - - - - - 724, n.

INROLMENT—Decree—Vacating - - 217
See Vacation of Inrolment.

INTEREST—Proof for, in bankruptcy—Secured creditor - - - - 760
See Creditor holding Security.

—— Advances to children—Statute of Limitations.
See Limitations, Statute of. 1. [17

INVESTMENT BY TRUSTEES—*Improper Investment—Insufficient Value.*] Trustees were charged with the loss occasioned by an investment of the trust funds on insufficient security. The property was a hotel in the country, and the trustees had sent down a *London* surveyor who valued the hotel, including therein the licence, at nearly double the sum to be advanced. The hotel turned out to be worth much less than the sum advanced. The trustees gave no further account of the circumstances under which the advance was made:—*Held* (reversing the decision of *Bacon*, V.C.), that the trustees were chargeable with the sum so advanced. Budge *v.* Gummow - - 719

ISSUE—Cross-remainders - - - 665
See Cross-remainders by Implication.

—— Read "Children" - - - 275
See "Issue" read "Children."

—— "Then living" - - - - 275
See "Issue" read "Children."

—— "Then living" - - - - 660
See Issue then Living.

ISSUE AT LAW—Bankruptcy—Fraudulent preference - - - - 24
See Fraudulent Preference.

"ISSUE" READ "CHILDREN"—*Will—Remoteness—Limitations after an Estate Tail—Joint Tenancy or Tenancy in Common—"Then Living."*] No limitation after an estate tail is void for remoteness: and it makes no difference whether the limitation be directly to a class or to trustees to sell and divide among such class, provided the legal and beneficial interests be ascertainable at the determination of the estate tail.—If a clause in a will offends against the rule against perpetuities, yet, in construing the will, such clause cannot be disregarded, but must be read as the expression of the testator's intention as though no such rule existed.—A testator directed his trustee, after the failure of limitations for life and in tail, to sell his real estate and pay a share of the proceeds to the children, other than *J. G. H.*, of *A. H.* "then living," and the issue of such as

"ISSUE" READ "CHILDREN"—*continued.* should be then dead leaving issue, and the issue of *J. G. H.*, share and share alike, the issue of the said children of *A. H.* to have no greater share than their parent would have had if living, and the issue of *J. G. H.* to share on the same footing. The testator gave another share to *C.* for life, and after her death to the children of *A. H.* then living, and their issue, in the same words as in the gift of the former share.—At the close of the will the testator added a proviso that if his real estate should ever be sold under the limitations thereinbefore contained, and the money should become payable to the issue of *A. H.*, or the issue of *J. G. H.*, and any of such issue should be then dead leaving lawful issue, then the issue of such issue as should be so dead should receive the share which his or her parent would have been entitled to if living. The estates tail failed, and the proceeds of the sale became divisible:—*Held* (reversing the decision of *Malins*, V.C.), that the proviso at the end of the will was not void for remoteness:—That the "issue" of the grandchildren of *A. H.* must be confined to their children:—That where a grandchild of *A. H.* died before the period of distribution leaving children, such children took the share which their parent would have taken if he had been alive at the period of distribution, even in a case where the grandchild died before his parent in the lifetime of the testator and before his will:—That the gift to the grandchildren created a joint tenancy *inter se*, but the effect of the proviso was, that in the case of a grandchild dying leaving issue, the joint tenancy was severed as to his share. HEASMAN *v.* PEARSE 275

ISSUE THEN LIVING—*Will—Divesting of Vested Gift.*] A testator directed his trustees, after the failure of limitations for life and in tail, to sell his real estate and pay a third of the proceeds unto and amongst the children of *A. H.*, deceased, except *J. G. H.*, who should be then living, and the issue of such of them as should be then dead leaving issue, and the issue of *J. G. H.*, except his son, *J. W. H.*, share and share alike; the issue of deceased children of *A. H.* to have no greater share than their parents would have had if living, and the issue of *J. G. H.* to have no greater share than the issue of any other child of *A. H.* He gave another third upon trust to pay the income to *P. J.* for life, and after her decease to pay and divide such third share unto and amongst all the children of *P. J.* who should be "then living," and the issue of such as should be then dead, such issue to take no greater share than their parents would have had if living. At the end of the will was a proviso that if his estate should ever be sold under the above trust, and the money, or any part of it, become payable to the issue of *A. H.* and *P. J.*, or the issue of *J. G. H.* (except *J. W. H.*), or any of them, and any one or more of such issue should be then dead having left lawful issue, then the issue of such issue as should be so dead should have the share to which their, his, or her parent would have been entitled if living:—*Held*, that a child of *P. J.*, who survived her, but afterwards died before the period of distribution leaving issue, acquired a vested interest which was not by the final proviso divested in favour of the issue of such child; the word "issue" being held not to apply to children of *P. J.* HEASMAN *v.* PEARSE (2) 660

JOBBER—Custom of Stock Exchange - 733
See CUSTOM OF STOCK EXCHANGE.

JOINT POSSESSION—Production of documents
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JOINT AND SEVERAL CONTRACT—Proof in bankruptcy - - - - 178
See PROOF FOR JOINT AND SEVERAL CONTRACT.

JOINT TENANCY OR TENANCY IN COMMON—Gift to a class and their issue - 275
See "ISSUE" READ "CHILDREN."

JUDGMENT CREDITOR—Railway company 174
See SUPERFLUOUS LANDS.

JURISDICTION—Bankruptcy—Bill of sale 20
See INJUNCTION IN BANKRUPTCY. 1.
—— Bankruptcy—Opening accounts - 61
See BANKRUPTCY JURISDICTION. 1.
—— Bankruptcy—Setting aside bill of sale 494
See BANKRUPTCY JURISDICTION. 2.
—— Chancery and Lunacy—Lease by Ecclesiastical Commissioners - - 50
See ECCLESIASTICAL COMMISSIONERS.
—— Endowed Schools Commissioners - 500
See ENDOWED SCHOOLS COMMISSIONERS.
—— Lunacy—Agreement by committee - 229
See AGREEMENT BY COMMITTEE.
—— Winding-up—Appeal—Submission to Judge [45
See APPEAL FROM SUBMISSION TO JUDGE.
—— Winding-up—Compromise by liquidator 309
See COMPROMISE BY LIQUIDATOR.

LANDOWNER—Right to soil of highway - 421
See SOIL OF HIGHWAY.

LEASE—Agreement by letters - - 406
See AGREEMENT BY LETTERS.
—— Agreement for committee of lunatics 229
See AGREEMENT OF COMMITTEE.
—— Disclaimer by trustee in bankruptcy 28
See DISCLAIMER by TRUSTEE in BANKRUPTCY.
—— Ecclesiastical Commissioners — Consent of person entitled - - - 50
See ECCLESIASTICAL COMMISSIONERS.

LEGACY—Cumulative or substitutionary - 448
See CUMULATIVE GIFT.
—— Specific share of partnership property 1
See BEQUEST OF SHARE OF PARTNERSHIP PROPERTY.

LEGACY DUTY — *Estate pur autre vie—Rent-charge for Lives issuing out of Lands in England—Foreign Domicil*—36 *Geo.* 3, *c.* 52, *s.* 20—*Wills Act* (1 *Vict. c.* 26), *s.* 6.] A testator gave a rent-charge, to issue out of lands in *England*, to *A.* for life, and directed that after her death it should be continued, and equally divided between *B.*, *C.*, and *D.*, during their lives and the life of the longest liver. *B.* died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of *A.*, who was survived by *C.* and *D.*, the Crown claimed from *B.'s* executors legacy duty in respect of *B.'s* third share of the rent-charge:—*Held* (reversing the decision of *Bacon*, V.C.), that such duty was payable, for that the interest in the rent-charge which passed to *B.'s* executors was, by the *Wills Act*, "an estate *pur autre vie*, applicable by law in the same manner as personal estate," and

LEGACY DUTY—*continued.*
therefore fell within 36 Geo. 3, c. 52, s. 20, and that it was not exempt from duty by reason of *B.'s* foreign domicil, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person. Chatfield *v.* Berchtoldt - 192

LEGAL ESTATE—Plea of purchase without notice - - - - - 259
See Purchase for Value without Notice.

—— Trustee—Distinction between deeds and wills - - - - - 398
See Rule in Shelley's Case.

"LEGAL REPRESENTATIVES"—*Settlement.*] In a settlement the words "to pay to legal representatives in due course of administration":—*Held,* to amount to a direction to pay to next of kin, and not to executors or administrators.—Order of *Wickens,* V.C., affirmed. Briggs *v.* Upton 376

LETTER OF ALLOTMENT—Acceptance of shares—Posting letter - - - - 587
See Acceptance of Shares.

LETTER OF CREDIT—*Winding-up—Double Proof—Accommodation Bills—Liability of Drawer to Proof both by Holder and Acceptor.*] Bills of exchange were accepted by the *E. Company,* at the request of the *O. Company,* upon an undertaking by the *O. Company* that they would provide funds to meet the bills at maturity. The bills were indorsed by the *O. Company,* and discounted; but before they arrived at maturity both the *E.* and *O.* companies had stopped payment, and were in process of liquidation, and the bills were dishonoured. The holders of the bills recovered the amount due on them by proofs against the estates of both companies under their respective windings-up:—*Held* (reversing the decision of *Bacon,* V.C.), that the *E. Company* were not entitled under the contract of indemnity to prove as creditors against the *O. Company* for the amount that had been recovered from the estate by the holders of the bills.—The rule in bankruptcy that there cannot be a double proof against the same estate in respect of the same debt, *held* to apply in cases of winding-up under the *Companies Act,* 1862. *In re* Oriental Commercial Bank. *Ex parte* European Bank - - - 99

LIABILITY—Directors - - - 777
See Liability of Directors.

—— Jobber on Stock Exchange - - 733
See Custom of Stock Exchange.

—— Trustees—Insufficient investment - 719
See Investment by Trustees.

LIABILITY OF DIRECTORS—*Misrepresentation of Fact or Law—Liability to make good Representation—Directors.*] Three directors of a railway company opened, on behalf of the company, an account with a bank, and sent a letter signed by the three as directors, requesting the bank to honour cheques signed by two of the directors and countersigned by the secretary. The account having been largely overdrawn by means of such cheques, the bank sued the company at law, recovered judgment in 1865, and issued an elegit. The proceeds being insufficient to satisfy the debt, the bank filed a bill to make the directors personally liable:—*Held* (reversing the decision of *Bacon,* V.C.), that the letter did not make the directors personally responsible for the debt, for that, assuming the letter to contain a representation that the directors had power to overdraw the account, and such representation to be erroneous, this was not a misrepresentation of fact which the persons making it were bound to make good, but only a mistaken representation of the law; and moreover, that even if it had been such a false representation as the directors were bound to make good, the bank would have had no claim against them, since it had been able to enforce the same remedies against the company as if the representation had been true.—*Semble,* that the letter did not involve any representation that the directors had any other power than the ordinary powers of directors.—In 1864 a negotiation took place between the company and the bank as to the company giving security for the overdrawn account, and in December, 1864, the bank manager wrote to the secretary of the company, "I am directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and *J. A. B.*, to be held for the bank as collateral security, and I am to request that your unissued debentures are to be transferred into the same names, you undertaking to do this when you are in a position to issue them."—The secretary replied that the directors assented, and had directed him to allot the shares to the bank manager and *J. A. B.* as collateral security. In the following month, the company having sanctioned the issue of the preference shares, the secretary wrote, "I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank. I propose, as the course usually adopted in such cases, to register the shares in the names of two of the directors of the company, who will execute a transfer of them to you and *J. A. B.* on a mutual understanding that they are to be held by you only as collateral security for the debt due to the bank." The manager replied, "I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them." Preference shares were accordingly issued to two of the directors, and transferred by them to the bank manager and *J. A. B.*, and debentures given to the same two directors, which were similarly transferred. Nothing had been paid on the shares, and the company were not yet in a position legally to issue the debentures:—*Held* (reversing the decision of *Bacon,* V.C.), that the above circumstances did not make the directors personally liable, and that, on the construction of the correspondence, the directors had not made any representation that the shares and debentures were valid and fully paid-up shares and debentures, but the nature of the agreement was only that the shares and debentures should be placed under the control of the bank, so that when they were taken up by the public the money paid for them must come to the hands of the bank.—*Collen* v. *Wright* (8 E. & B. 647), *Richardson* v. *Williamson* (Law Rep. 6 Q. B. 276), and *Cherry* v. *Colonial Bank of Australasia* (Law Rep. 3 P. C. 24), distinguished.—*Rashdall* v. *Ford* (Law Rep. 2 Eq. 750) approved. Beattie *v.* Lord Ebury 777

LICENCE—Public house—Transfer of - 12
See SALE OF PUBLIC-HOUSE.

LIEN—Bill of exchange drawn against cargo
See BILL DRAWN AGAINST CARGO. [695

—— Freight—Mortgage of ship - - 507
See MORTGAGE OF SHIP.

—— Solicitor—Appeal - - - 221
See APPEAL FOR SMALL AMOUNT.

LIFE INSURANCE—Transfer of business—Novation of contract - - - 651
See NOVATION OF CONTRACT.

LIMITATIONS, STATUTE OF — *Will—Advancement—Interest.*] A testator, by his will, gave his property to his wife for life, and after her death equally between his children, subject to a proviso directing that his trustees should deduct from the share of his daughter *M. B.* the sum of £200 which he had advanced to her, and add it to his personal estate; and that if, at the period of distribution, *M. B.* "should be indebted to any or either of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share, and pay the same to the brother or sister to whom the same might be owing." *M. B.* had borrowed from one brother £100, on a promissory note bearing interest, and had borrowed other sums from another brother. Nearly all these debts had, before the time of distribution, become barred by the *Statute of Limitations*:—*Held*, by the Vice-Chancellor of the Duchy Court of *Lancaster*, that the trustees were authorized to deduct from *M. B.'s* share all the debts, though barred by the statute, with the interest on such as carried interest:—*Held*, on appeal, that the decree was right so far as regarded the principal of the debts, though barred by the statute; but that the intention of the testator was to put advances by brothers and sisters on the same footing as advances by himself, and that interest, therefore, ought not to be deducted. POOLE *v.* POOLE - - - - - - - 17

2. —— *Winding-up — Companies Act*, 1862, *s.* 98.] A company was ordered to be wound up in February, 1865. The certificate of debts and claims was made in December, 1870; and in January, 1871, a dividend was paid on the debts which had been established. In March, 1871, the holder of bills of exchange to a large amount, which had been accepted by the company and had become payable in February, 1865, gave the first notice of his claim and applied for leave to prove, not disturbing previous dividends. The proof having been rejected by the Master of the Rolls, on the ground that the debt was barred by the *Statute of Limitations*:—*Held*, on appeal, that by the *Companies Act*, 1862, the assets are made applicable to the payment of all liabilities of the company subsisting at the date of the winding-up order; that from that time the *Statute of Limitations* does not run against a creditor, and that the claimants were entitled to prove, not disturbing former dividends. *In re* GENERAL ROLLING STOCK COMPANY. JOINT STOCK DISCOUNT COMPANY'S CLAIM - - - - - - 646

—— Waste—Successive tenants for life - 676
See WASTE.

LIQUIDATION BY ARRANGEMENT—Default in payment of composition — Action by creditors - - - 724, n.
See INJUNCTION IN BANKRUPTCY. 3.

—— Privilege of Parliament - - 519
See PRIVILEGE OF PARLIAMENT.

—— Resolution to transfer proceedings—Extraordinary resolution of creditors - 526
See EXTRAORDINARY RESOLUTION OF CREDITORS.

LUNACY—Committee—Agreement for lease 229
See AGREEMENT BY COMMITTEE.

—— Lease by Ecclesiastical Commissioners — Jurisdiction .. - - 50
See ECCLESIASTICAL COMMISSIONERS.

—— Maintenance of—Person not found insane
See MAINTENANCE OF LUNATIC. [53

MAIL TRAINS—Control of railway company—Refreshment rooms - - 409
See EXPRESS TRAINS.

MAINTENANCE OF LUNATIC—*Past Maintenance—Lunacy Regulation Act*, 1862.] A person of unsound mind, not found so by inquisition, was kept by her brothers in a private asylum from 1838 to 1859, at a total expense of more than £700. The brothers having suffered losses in trade, and being unable further to support her, she was kept in a county asylum, at the expense of the county, from 1859 to 1871, the total expense exceeding £300. In 1871 a legacy was paid to her brothers, which by a will was directed to be paid to them to be applied for her benefit. This legacy was ordered to be retained by the brothers for her past maintenance in preference to the claims of the county, the brothers undertaking to maintain her in future; and, *semble*, they would, even without giving this undertaking, have been entitled so to be repaid for past maintenance. *In re* GIBSON - - 52

MINE—Rights of owner - - - 699
See RESERVATION OF MINERALS.

—— Cost-book system—Custom of *Cornwall* 286
See COST-BOOK COMPANY.

MINERALS—China clay - - - 699
See RESERVATION OF MINERALS.

MISREPRESENTATION—Fact or law—Directors of company - - - - 777
See LIABILITY OF DIRECTORS.

—— Prospectus of company - - 55
See MISREPRESENTATION OF PROSPECTUS.

—— Trade-mark - - - - 611
See TRADE-MARK. 2.

MISREPRESENTATION IN PROSPECTUS—*Shareholder — Allotment — Grounds for Cancellation.*] The cancellation of shares by directors, where the shareholder has valid grounds to claim cancellation, is good and effectual, although the shareholder claimed such cancellation on invalid grounds, not being at the time aware of the existence of valid grounds.—In the prospectus of a company it was untruly stated that 80,000 shares had been subscribed for. *W.*, relying on this statement, applied for shares, and had ten shares allotted to him, on which he paid the deposit. The committee of the *Stock Exchange* refused to grant a settling day, whereupon *W.*

MISREPRESENTATION IN PROSPECTUS—*cont.* wrote to the directors that they ought to return the deposit. The shareholders at a meeting agreed that the allottees were entitled to have their allotments cancelled. Thereupon *W.* received back his deposit money, and returned his share certificates, and an entry was made in the register of shareholders that his shares were cancelled. The company was afterwards wound up, and *W.* then discovered the misrepresentation as to the number of shares subscribed for :—*Held* (reversing the decision of *Wickens,* V.C.), that the cancellation of the allotment was valid, the directors having been aware of the misrepresentation though the shareholder was not aware of it; and that *W.* was not a contributory either as a present or past member. *In re* London and Mediterranean Bank. Wright's Case - - - 55

MISTAKE — Transfer of shares — Error in distinguishing number - - 485
See Transfer of Shares. 4.

MIXED FUND—Exoneration of personalty—Discretion in trustees to sell - - 439
See Exoneration of Personalty.

MONEY DEMAND — Jurisdiction — Breach of trust - - - - - 427
See Building Society.

MORTGAGE—Commission in army—Priority 109
See Mortgage of Commission.

—— Partnership property—Act of bankruptcy 534
See Mortgage of Partnership Property.

—— Power of sale—Extinction by transfer
See Extinction of Power.

—— Priority—Negligence—Fraud - 75
See Priority from Negligence.

—— Registration—Companies Act, 1862, s. 43
See Unregistered Mortgage. [289

—— Ship - - - - - 507
See Mortgage of Ship.

MORTGAGE OF COMMISSION—*Priority—Notice—Further Advances.*] *F.*, an officer in the army, gave to the Plaintiff, in March, a charge on the proceeds of the sale of his commission, for a bill for £62 10*s.* discounted for him by the Plaintiff, and "for any further sum or sums that you may advance, or for which I may be liable to you." In June *F.* gave *R.* a charge on the same moneys, and in July gave the *O. Bank* a charge. In August the bill for £62 10*s.* not having been paid, *F.* gave the Plaintiff, who had no notice of the other incumbrances, a fresh bill for £88 14*s.*, being the amount of the former with interest and costs. *F.* also gave *B.* a charge on the 8th of September, and *L.* a charge on the 14th of September. The Plaintiff, still without notice, on the 18th of September, discounted a £25 bill for *F.*; and, at what time did not appear, became indorsee from *B.* of a bill for £80 accepted by *F.* The proceeds of the sale of *F.'s* commission were in the hands of *H. & Co.* for distribution at, and not before, the opening of their bank on the 8th of December. The *O. Bank* left notice by letter of their charge at *H. & Co.'s* bank on the 7th, after it had closed for the evening; the other incumbrancers gave notice at nine on the morning of the 8th when the bank opened :—*Held*, by the Master of the Rolls, that the charges ranked as follows: (1) *R.'s* charge; (2) the Plaintiff's bill of £88 14*s.*; (3) the Plaintiff's £80 bill indorsed to him by *B.*; (4) *B.'s* charge; (5) the Plaintiff's bill for £25; (6) *L.'s* charge; (7) the *O. Bank*:—*Held*, on appeal, that the notice of the *O. Bank* being delivered after banking hours on the 7th was good as a notice for the opening of the bank on the 8th, and that all the notices were to be treated as contemporaneous; that the renewal of the Plaintiff's bill in August did not postpone his security; that the Plaintiff's £25 bill as a further advance had the same priority as the £88 14*s.*, but that the £80 bill was not included in the Plaintiff's security, and that the securities must rank as follows: (1) the Plaintiff's £88 14*s*, and £25; (2) *R.'s* charge; (3) the charge of the *O. Bank*, and then the other charges in the order of their dates. Calisher *v.* Forbes - 109

MORTGAGE OF PARTNERSHIP PROPERTY—*Bankruptcy—Power of Attorney—Notice of Act of Bankruptcy—Act of Bankruptcy under former Act—Repeal*—32 & 33 *Vict. c.* 83, *s.* 20.] *M. D.* and *J. D.* were carrying on business in partnership. In September, 1869. *J. D.* gave to *J. A. M.* a power of attorney, authorizing him to sell certain property of *J. D.*, including a particular ship which was in fact partnership property, and then went abroad. In November a mortgage deed was executed, by which, after reciting that the partners and each of them were indebted to *S.* in an amount not ascertained, *M. D.* and *J. D.* purported to convey to *S.* property which formed nearly the whole assets of the partnership, to secure all moneys which then were or might thereafter become due to *S.* from the partners or either of them. At the same time a bill of sale was executed, by which *J. D.*, with the concurrence of *M. D.*, purported to assign the ship to *S.* absolutely at a certain price, subject to the incumbrances thereon. These deeds were executed by *M. D.* and *J. A. M.* as attorney for *J. D.* In April, 1870, *M. D.* and *J. D.* were adjudged bankrupts; the act of bankruptcy by *J. D.* being his leaving *England* in September, 1869, with intent to defeat or delay his creditors. The County Court Judge held that the execution of the mortgage on behalf of *J. D.* was void, as not coming within the scope of the power of attorney, but that the mortgage was valid as the deed of *M. D.* alone, being, in his opinion, executed to secure an antecedent debt, and further advances made on the promise of having security for the whole, and that its effect was to make *S.* and the trustee in bankruptcy tenants in common of the mortgaged property. He held the bill of sale to be good, being of opinion that though *S.* knew circumstances from which it was reasonably to be inferred that *J. D.* left *England* with intent to defeat or delay his creditors, this could not prevail against the positive oath of *S.*, that he believed that *J. D.* had left *England* only to make a purchase and would speedily return, and that he, *S.*, did not suspect the firm of being insolvent. On appeal the Chief Judge held the mortgage to be an act of bankruptcy, and therefore void, and the bill of sale to be void on the ground that the power of attorney was revoked by the act of bank-

MORTGAGE OF PARTNERSHIP PROPERTY—*continued.*

ruptcy committed by *J. D.*:—*Held*, on appeal to the Lords Justices, that the mortgage was wholly void as against the trustee, for that by it *M. D.*, knowing the firm to be insolvent, attempted to make the partnership property a security for separate debts of himself and *J. D.*, which was a fraud on the creditors of the partnership and an act of bankruptcy: *Held*, also, that although a power of attorney is not for all purposes revoked by an act of bankruptcy, and a sale under it to a purchaser who had no notice of an act of bankruptcy would be good as against the trustee under a subsequent adjudication, the bill of sale was void, for that *S.* knew facts which were sufficient to inform him that *J. D.* had committed an act of bankruptcy, and he could not escape the consequence by saying that he had not drawn this inference from them. The effect of an act of bankruptcy under the former law is saved by the repealing section (20) of 32 & 33 Vict. c. 83. *Ex parte* SNOWBALL. *In re* DOUGLAS - - - - - 534

MORTGAGE OF SHIP—*Lien on Freight—Mortgagee in Possession—Priority—Tacking—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 67-70.] The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. LIVERPOOL MARINE CREDIT COMPANY *v.* WILSON - 507

MORTMAIN—*Will—Gift to erect or endow a Church—Endowment of Future Church—Impracticable Object—Cy-près*—43 *Geo.* 3, *c.* 108.] A gift for the endowment of a future church is not void under the *Mortmain Act*. A testatrix gave the residue of her personal estate to trustees upon trust to be by them applied in aid of erecting or endowing an additional church at *A.*:—*Held* (reversing the decision of *Bacon*, V.C.), that the gift was not intended to be confined to a church to be erected or commenced before the death of the testatrix, but was applicable to any future church. An inquiry was directed whether the residuary personal estate could be employed in aid of erecting or endowing an additional church at *A.* Whether the Court will hold a fund for an indefinite time which has been given for a charitable object, where there is no reasonable prospect of carrying it into execution—*Quære.* Whether the doctrine of *cy-près* applies where there is a gift to a particular object which there is no reasonable prospect of carrying into execution — *Quære.* Where pure and impure personalty is given to trustees to erect or endow a church, they are entitled, under the 43 Geo. 3, c. 108, to £500 out of the impure personalty, in addition to the whole of the pure personalty. SINNETT *v.* HERBERT 232

MULTIFARIOUSNESS—Owners and occupiers—Commissioners of forest - - 456
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NOTICE—Company—Money borrowed for illegal purpose - - - - 161
See UNAUTHORIZED DEALING IN SHARES.

—— Opening railway—Board of Trade - 767
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—— Purchase without - - - 259
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NOTICE OF OPENING RAILWAY—*Railway Company—Board of Trade*—5 & 6 *Vict. c.* 55. *s.* 4.] Under the powers of certain Acts of Parliament junctions were made between the main line of a railway company and two branch lines of railway on opposite sides of the main line; so that trains coming from one of the branch lines ran for some distance along the main line and then passed on to the other branch line. Some years afterwards the company laid down a line of railway parallel to their main line for about a mile, and substituted for one of the original junctions a new junction, nearly opposite to the other original junction, so as to form between the two branch lines a level crossing over the main line. The company also made two new stations on this new line:—*Held* (affirming the decision of *Wickens*, V.C.), that the new line was a railway or portion of railway which, under 5 & 6 Vict. c. 55, s. 4, could not be opened without previous notice to the Board of Trade. ATTORNEY-GENERAL *v.* GREAT WESTERN RAILWAY COMPANY. - - - - - 767

NOVATION OF CONTRACT—*Transfer of Business of Life Insurance Company — Acquiescence — Annuitant.*] The deed of settlement of the *I. Life Insurance Company* provided that in a certain event a general meeting of the company might resolve on its dissolution, and that in such a case proper measures should be taken for effecting such dissolution, without prejudice to the rights of the parties then insured, and thereupon the affairs of the company should with all convenient speed be wound up, and the liabilities of the company be satisfied or otherwise sufficiently provided for by reinvestment or by transfer to other existing and approved assurance offices. In accordance with this provision a resolution was passed to dissolve the company, and the business and assets were transferred to the *E. Company*. The Petitioner, who had purchased an annuity on his life from the *I. Company*, refused to assent to the transfer of his policy to the *E. Company*; but he received payment of his annuity from the *E. Company* till it was wound up. He then presented a petition to wind up the *I. Company*:—*Held*, first, that although the dissolution and transfer of the business of the *I. Company* were perfectly valid, yet the words in the deed of settlement reserving the rights of the parties assured were conclusive in shewing that there could be no novation of the contract with the policy-holders without their consent. Secondly, that the acceptance of the payment of the annuity from the *E. Company* was no evidence that the

NOVATION OF CONTRACT—*continued.*
Petitioner had adopted the *E. Company* as his debtors, and that he was still a creditor of the *I. Company.*—Order of *Malins*, V.C., winding up the *I. Company*, affirmed. *In re* INDIA AND LONDON LIFE ASSURANCE COMPANY - - - 651

OFFICIAL LIQUIDATOR—*Purchase of Shares in Name of a Trustee—Suit by Liquidator in Name of Contributory for Indemnity.*] The right of a trustee, in whose name shares in a company were standing at the time of its being wound up, to indemnity from his *cestui que trust*, enforced by the liquidator in a suit in the name of the trustee who had compromised with the liquidator for his liability on the shares upon terms including a stipulation that the liquidator should be at liberty to continue the suit.—Decree of *Malins*, V.C., affirmed. HEMMING *v.* MADDICK - - - 395
—— Production of documents—Discovery 207
See PRODUCTION OF DOCUMENTS. 1.

ORDER TO PASS PUBLIC EXAMINATION — *Bankruptcy — Conditional Order — Bankruptcy Act*, 1869, *s.* 19—*Bankruptcy Rules*, 1870, *r.* 140, *Form* 45.] The Court of Bankruptcy has no power to make an order that a bankrupt do pass his public examination conditional on his doing certain acts. The examination ought to be adjourned till he has done all that is required by the Act and the Rules, and till he is able to swear his affidavit in the Form No. 45 appended to the Rules, and then an absolute order for his passing should be made. *Ex parte* SMITH. *In re* ANGERSTEIN - - - - - 662

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PARLIAMENT—Bankruptcy—Member of House of Commons - - - 519
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PARLIAMENTARY POWERS—Railway company
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PART PERFORMANCE—Building on another's land - - - - - 562
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—— Owners and occupiers—Commoners of forest
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PARTNERSHIP—Bequests of share of specific portions of assets - - - 1
See BEQUEST OF SHARE OF PARTNERSHIP PROPERTY.
—— Joint possession of books — Production of documents - - - - 312
See PRODUCTION OF DOCUMENTS. 2.
—— Mortgage of partnership property—Act of bankruptcy - - - 534
See MORTGAGE OF PARTNERSHIP PROPERTY.

PATENT—Specification—Combination of well-known materials - - - 570
See SPECIFICATION OF PATENT.

PAST MEMBERS—*Winding-up—Class B—Companies Act*, 1862, *s.* 38.] *Held* (reversing the decision of *Bacon*, V.C.), that, in estimating the debts for which contributories in Class B (past members) are liable, all sums paid in respect of those debts in the course of the winding-up must be deducted; and in estimating what sums have been so paid, the assets (including the calls on the A contributories) are to be treated as applied in payment *pari passu* of all the debts:—*Held*, also, that the contributions of B contributories are to be applied in payment of the debts to which the B contributories are respectively liable. Statement of the rules according to which the amount of liability of each of the B contributories is to be ascertained. *In re* ORIENTAL COMMERCIAL BANK. MORRIS' CASE - - - 200

PENSION—Assignment of all debtor's property—Exception - - - - 214
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—— Multifariousness—Occupiers and owners—Right of owner - - - 456
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POWER—Extinction of—Transfer of mortgage
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—— Bill by company being wound up—Security for costs - - - - 225
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—— Discovery injurious to Defendant 90, 94, n.
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—— Evidence—Statement to discredit witness 395
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—— Inrolment of decree—Vacating - 217
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—— Lunacy—Agreement by committee - 229
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—— Production of documents - - 207, 312, 686
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—— Trustee Act, 1850 - - - 223
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—— Trustee Relief Act - - - 609
See TRUSTEE RELIEF ACT.

PRESUMPTION—Right to soil of highway 421
See SOIL OF HIGHWAY.

—— Time of death - - - - 120
See PRESUMPTION OF DEATH.

PRESUMPTION OF DEATH—*Legatee—Statute of Limitations.*] A testator gave a legacy to be equally divided, within twelve months, between the children of *W. P.*, who should be living at his, the testator's, death, such sum to be raised out of the property thereinafter given to his executrix for life. He then gave to his executrix certain real and personal estate for her life, and after death to the children of *W. P.* living at his, the testator's, death. At the testator's death in January, 1847, there were four children of *W. P.* living, but another, *J. T. P.*, had not been heard of since February, 1845, and nothing ever was heard of him afterwards. The executrix paid to the four children, who were known to be living, four fifth shares of the legacy, but did not raise the remaining fifth. In 1851 she became lunatic, and in 1852 the funds, to the income of which she was entitled for life, were transferred to the credit of the lunacy to the account of the lunatic and the children of *W. P.*, and the income was ordered to be applied for her benefit. In 1871 the four surviving children of *W. P.* and the administrator of *J. T. P.* petitioned that the remaining fifth share of the legacy, with interest, might be paid to the four children, or, if not, then to the administrator of *J. T. P.* :—*Held*, that, there being no proof that *J. T. P.* survived the testator, the share must be paid to the four children who were known to have survived him; that the manner in which the Court had dealt with the fund took the case out of the statute as to the principal, but that only six years' arrears of interest should be given. *In re* WALKER - - - - 120

PRINCIPAL AND SURETY—Discharge of surety
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PRIORITY—Mortgage—Negligence—Fraud 75
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PRIORITY—*continued.*

—— Mortgage of proceeds of sale of commission
See MORTGAGE OF COMMISSION. [109

—— Mortgage on ship—Lien on freight - 507
See MORTGAGE OF SHIP.

PRIORITY FROM NEGLIGENCE—*Mortgage—Execution of Deed—Signing Receipt—Fraud Notice—Defects in Plans—Attestation.*] The solicitor of two mortgagees put up for sale by auction, without any authority, the mortgaged estate. He professed to have bought the estate, and prepared a conveyance which purported to be made by the second mortgagee under his power of sale. The mortgagees both executed the conveyance, and also signed indorsed receipts for money as paid to them, though no money was in fact paid to them. The solicitor took possession of the estate and continued to pay the interest to the mortgagees, and afterwards made an equitable mortgage of the estate, representing it to be his own and unincumbered. As to the first mortgagee, there was evidence that he was deceived by the solicitor; as to the second mortgagee, there was evidence that he trusted the solicitor implicitly. There were inconsistencies on the plans upon the different deeds, and the solicitor had attested some of the prior deeds:—*Held* (affirming the decree of *Malins*, V.C.), that, under the circumstances, the equitable mortgagee had priority over the second mortgagee :—*Held*, that the inconsistencies in the plans and the attestation by the solicitor did not put the equitable mortgagee on inquiry so as to fix him with constructive notice. HUNTER *v.* WALTERS. CURLING *v.* WALTERS. DARNELL *v.* HUNTER - 75

PRIVILEGE OF PARLIAMENT—*Bankruptcy—Liquidation by Arrangement—Member of House of Commons—Bankruptcy Act*, 1869, *s.* 122.] The direction in section 122 of the *Bankruptcy Act*, 1869, that if within the time therein mentioned the order of adjudication against a bankrupt member of the House Commons is not annulled and his debts are not fully paid or satisfied, the Court shall certify the same to the Speaker of the House of Commons, is not, by sect. 125, sub-sect. 7, made applicable in the case of a member who has not become bankrupt but whose affairs are in liquidation under Part 6 of the Act. *Ex parte* POOLEY. *In re* RUSSELL - - - 519

PRODUCTION OF DOCUMENTS—*Winding-up—Practice—Affidavit—Official Liquidator.*] The official liquidator of a company is in the position of a receiver or manager of partnership assets appointed by the Court. Where he represents the company in a suit against strangers, or in a proceeding in the winding-up against an alleged contributory, the adverse party has a right to the same discovery from him as from an ordinary litigant. But where the question is whether a past shareholder is to be placed on list B, and, if so, what is the extent of his liability, that being a question which does not concern the company, the official liquidator is only bound to afford equal facilities to the shareholder and the creditors, but not to make discovery at the instance of either party.—The decision of the Master of the Rolls reversed.—Observations on *In re Barned's Banking Company, Ex parte Contract Corporation* (Law Rep. 2 Ch.

PRODUCTION OF DOCUMENTS—*continued.*
350). *In re* CONTRACT CORPORATION. GOOCH'S CASE - - - - - - - 207

2. —— *Practice — Joint Possession—Entries by one Partner in Partnership Books.*] The sole Defendant in a suit relating to transactions in which he had been engaged with the Plaintiff, had made entries relating to these transactions in the books of a partnership firm of which he was a member:—*Held* (reversing the decision of *Malins*, V.C.), that no order could be made on the Defendant to produce the partnership books without the consent of his partner. HADLEY *v.* MCDOUGALL 312

3. —— *Practice — Pedigree.*] The Plaintiff filed his bill to establish his title by descent to lands of which *A. F.* died seised in fee. The bill stated that *A. F.* acquired part of the lands by descent from her maternal grandmother, *S. F.*; that the last purchaser of these estates was an ancestor of *S. F.*, and that the Plaintiff was heir-at-law of such ancestor, and also of *A. F. ex parte maternâ*, and that *A. F.* had died intestate, and that the Plaintiff was lineally descended from the great-grandfather of *A. F.*, and was her heir-at-law. The Defendants pleaded a denial of the Plaintiff's heirship in bar to all the relief, and to all the discovery except to so much of the bill as sought discovery whether the Plaintiff was lineally descended from *A. F.'s* great-grandfather. Issues were directed as to the Plaintiff's heirship. After this, the Plaintiff having applied for production of documents, the Defendants by their affidavit admitted the possession of a pedigree, which they had covered up, except so much of it as shewed the direct line from *S. F.* to *A. F.*; and the Defendants stated by their affidavit that the covered part evidenced or related to their own title only, and did not evidence or tend to make out the title claimed by the Plaintiff, or any link therein:—*Held* (reversing the decision of *Bacon*, V.C.), that a pedigree was not to be looked upon as one indivisible document of which the Plaintiff was entitled to see the whole, and that the parts covered were sufficiently protected by the affidavit.—The Defendants objected to produce other documents on the ground that persons not parties to the suit were interested in them:—*Held* (affirming the decision of *Bacon*, V.C.), that this was no ground for resisting production.—The Defendants objected to produce other documents on the ground that they did not relate to any issue or matter to be tried at the hearing, but were documents to the production of which the Plaintiff would be entitled by way of consequential relief if he succeeded on the trial of any of the issues, but not in any other event:—*Held* (reversing the decision of *Bacon*, V.C.), that these documents were protected. KETTLEWELL *v.* BARSTOW 668

—— Discovery injurious to defendant 90, 94, n.
See DISCOVERY INJURIOUS TO DEFENDANT. 1, 2.

PROMISSORY NOTE—Joint and several proof in bankruptcy - - - - 178
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—— Surety—Proof in winding-up - - 680
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PROOF—Bankruptcy—Contingent liability 35
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—— Bankruptcy—Joint and several contract 178
See PROOF FOR JOINT AND SEVERAL CONTRACT.

—— Winding-up—Surety—Promissory note 680
See PROOF BY SURETY.

PROOF BY SURETY—*Surety—Promissory Note—Winding-up—Share of Dividends.*] Four directors of a company, by way of security for any balance which might be due from the company to a bank, gave the manager of a branch of the bank their promissory note for £2000; and the manager indorsed the note to the bank. The company was wound up. The bank proved in the winding-up for £3659 as due by the company to the bank, and was declared entitled to a dividend of £1051 on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank £2067 for debt and interest due on the note:—*Held* (affirming the decision of *Bacon*, V.C.), that the giving the note was in pursuance of an ordinary contract of suretyship, and that the surety who had paid the £2067 was entitled to receive from the bank a share of the dividend, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank.—The rule established by *Ex parte Turner* (3 Ves. 243) that in similar cases in bankruptcy the sum paid by the surety is, in calculating the proportions of dividend, to be considered as expunged, does not apply to cases in winding up. GRAY *v.* SECKHAM - - - 680

PROOF FOR CONTINGENT LIABILITY—*Indemnity — Contract, when broken — Bankruptcy Act*, 1849, *s.* 178—*Bankruptcy Act*, 1861, *s.* 153.] *K. & Co.* having made a claim to bills of exchange, which were in the hands of *W.* as stakeholder, *W.* handed them over on *K. & Co.* giving him a guarantee to save and keep him harmless and indemnified from and against all claims and demands which might be made against him for the bills, and from and against all costs and damages which *W.* might sustain in consequence of handing over the bills; and further, that if proceedings were taken against *W.* in respect of the bills *K. & Co.* would save harmless and keep indemnified *W.* from all costs and damages by reason of such proceedings, and that if *W.* was ordered in such proceedings to give security, or bring money into Court, *K. & Co.* would procure such security, or provide *W.* with the money to be paid into Court, as the case might be. An adverse claimant brought an action against *W.* for the bills, which action *K. & Co.* defended by their own attorney, until *K. & Co.* executed a deed of inspectorship, which was registered under the *Bankruptcy Act*, 1861, and under which deed all creditors might prove who could have proved under an adjudication of bankruptcy of the same date. After this, judgment was recovered in the action against *W.*:—*Held*, that *W.* was not a creditor who could have proved in bankruptcy under the *Bankruptcy Act*, 1861, s. 153, for that the contract did not contain any warranty of the title of *K. & Co.* to the bills, nor any undertaking to pay their amount as soon as a valid claim was made against *W.* for them, but only an undertaking that *W.* should not sustain any loss or expense in respect of them, and that as *K. & Co.*

PROOF FOR CONTINGENT LIABILITY—*cont.* had defended the action up to the date of the deed of inspectorship, the contract had not up to that time been broken.—*Held*, also, that the contract was not a contract to pay money upon a contingency, so as to give a right of proof under the Bankruptcy Act, 1849, s. 178. *Ex parte* WISEMAN. *In re* KELSON, TRITTON, & CO. - 35

PROOF FOR JOINT AND SEVERAL CONTRACT —*Bankruptcy—Double Proof—Bankruptcy Act*, 1869, *s.* 37.] A joint and several promissory note was signed by two members of a firm, by the firm, and by several other persons. The firm having become bankrupt, the holder of the note carried in proofs against the joint estate of the firm, and against the separate estates of the two partners who had signed the note:—*Held* (affirming the decision of the Registrar), that the holder was entitled to prove against and receive dividends from both the joint estate of the firm and the separate estates of the two partners who had signed the note. *Ex parte* HONEY. *In re* JEFFERY 178

PUBLIC HOUSE—Sale of—Transfer of licence
See SALE OF PUBLIC-HOUSE. [12

PUBLICI JURIS—Trade-mark - - 611
See TRADE-MARK. 2.

PURCHASE FOR VALUE WITHOUT NOTICE—*Trustee—Equal Equities—Legal Estate—Notice—Breach of Trust.*] The defence of purchase for value without notice may be sustained, although the Defendant, in order to make out his title to the legal estate, must rely on an instrument which discloses the title of the Plaintiff, the Defendant not having had notice of such instrument at the time of his purchase.—The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee of the settlement afterwards reconveyed part of the property to the mortgagor on payment of part of the mortgage money, which he appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing, with the connivance of the trustee, both the prior mortgage and the reconveyance. When the fraud was discovered, the *cestuis que trust* under the settlement filed a bill against the new mortgagees claiming priority:—*Held*, that the Court would not interfere to take away the legal estate which passed to the new mortgagees under the reconveyance.—The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee afterwards induced the mortgagor to execute a deed by which the mortgaged property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mortgage, and shewing title under the pretended purchase deed, conveyed the property to a mortgagee without notice:—*Held*, that the Court would not interfere to take away the legal estate from the mortgagee.—Decree of the Master of the Rolls reversed.—*Carter* v. *Carter* (3 K. & J. 617) disapproved of. PILCHER *v.* RAWLINS - 259

PURPOSE OF RAILWAY—Evidence that land is required - - - - 364
See DURATION OF AGREEMENT.

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—— Mortgage—Companies Act, 1862, s. 43 289
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REMOTENESS—Limitation of the gift tail - 275
See "ISSUE" READ "CHILDREN."

RENT-CHARGE—Legacy duty - - 192
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RESERVATION OF MINERALS—*China Clay—Reservation—Lights of Mine Owner—Enfranchisement — Misdescription — Injunction — "Threaten and Intend."*] In 1799 the Duke of *Cornwall*, as lord of a manor, granted the freehold in a copyhold tenement to the copyholder, reserving "all mines and minerals within and under the premises, with full and free liberty of ingress, egress, and regress, to dig and search for, and to take, use, and work the said excepted mines and minerals," the deed not containing any provision for compensation. Under the tenement was a bed of china clay, the existence of which did not appear to have been contemplated by either party at the time, no china clay having ever been gotten out of the lands of the duchy, though the existence of tin was well known. It was admitted in the cause that china clay could not be gotten without totally destroying the surface, and the process of getting tin by "streaming," which was an ancient, and at the time of the grant the most usual, mode of getting tin, was almost equally destructive. A bill by the owner of the surface to restrain the owner of the minerals from getting china clay having been dismissed by *Wickens*, V.C., on the ground that the reservation included china clay with the power to get it:—*Held*, on appeal, that the china clay was included in the reservations, but that the surface-owner was entitled to an injunction to restrain the owner of

RESERVATIONS OF MINERALS—*continued.*
the minerals from getting it in such a way as to destroy or seriously injure the surface. When a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to shew clearly that he is intended to have that power. The deed granted the property by the description of "All that copyhold tenement called *Greys*, consisting of a house with divers parcels of land, containing 103 acres (that is to say)" then followed parcels, concluding with "a parcel of land running with *G. Moor*, containing twenty-seven acres, which said tenement, called *Greys*, is now held for the life of *G. H.* by copy of Court roll:"—*Held*, that on the construction of this grant, a piece of uninclosed land, containing twenty-seven acres, and forming part of the waste of the manor, and proved never to have been a part of the copyhold tenement, did not pass, although there was nothing else to answer the twenty-seven acres mentioned in the deed, and the 103 acres could not be made up without it.—The Defendants *G.* and *I.*, who were entitled to the minerals under *Greys*, had granted a lease to their co-Defendants of the china clay under various lands, including great part of *Greys*. The lessees had entered *Greys* for the purpose of getting china clay, but had not got any, and long before the bill was filed had ceased to occupy any part of that estate, and were getting clay only from the twenty-seven acres of which the Plaintiffs claimed to be owners, but to which they were decided not to be entitled. The Defendants by their answers stated that they had no intention of getting clay at present out of *Greys*, but they insisted that they were entitled to do so:—*Held*, that the Defendants "threatened" to get the clay so as to give the Court jurisdiction to interfere by injunction. Hext *v.* Gill. - 699

RESIDENCE ABROAD—Appointment of new trustee - - - - - 223
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RESPONDENTS TO APPEAL—Costs of - 130
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RESTRAINT ON ANTICIPATION—Impeachment of waste - - - - - 433
See Impeachment of Waste.

RESULTING TRUST—*Voluntary Conveyance—Resulting Trust—Statute of Frauds—Illegality—Pleading.*] A Defendant who wishes to rely on the illegality of a transaction as a defence must plead it in distinct terms.—The *Statute of Frauds* cannot be used by a Defendant to cover a fraudulent act.—The Plaintiff conveyed an estate to the Defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by the Defendant; but no purchase-money actually passed, and the Plaintiff alleged that he conveyed the estate to the Defendant as a trustee for him. The Defendant, in his answer, admitted that he gave no consideration for the estate, but stated that the Plaintiff made the conveyance fearing that an adverse decision would be made against him in a suit then pending in Chancery; and that it was understood that the Defendant should account to the Plaintiff for the rents until he could make arrangements for paying the purchase-money, and if no such arrangements could be made, that he should reconvey the estate. The Defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the *Statute of Frauds*:—*Held*, first, that there was no sufficient averment that the transaction was an illegal one; secondly, that the *Statute of Frauds* could not be pleaded in answer to the Plaintiff's claim; and that as the evidence did not establish the existence of any such agreement as was alleged by the Defendant, the Defendant must reconvey the estate to the Plaintiff.—Decree of the Master of the Rolls affirmed. Haigh *v.* Kaye 469

REVIVOR AND SUPPLEMENT—Appointment of representative of deceased party - 634
See Appointment of Representative.

REVOCATION—Acceptance of Shares - 587
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—— Power of—Insertion in voluntary settlement - - - - 244
See Voluntary Settlement. 2.

RIGGING THE MARKET—Borrowing powers—Notice - - - - 161
See Unauthorized dealing in Shares.

RIGHT OF COMMON—*Pleading—Parties—Multifariousness.*] The Plaintiffs filed their bill on behalf of themselves, and all other the owners and occupiers of lands within the *Forest of Essex*, other than the waste lands of the forest, except such of them as were Defendants, or alleged to be represented by the Defendants, against the lords of the several manors within the forest and two persons who claimed to be owners and occupiers of portions of the waste lands which had been inclosed, and the Attorney-General. The Plaintiffs alleged that they were owners and, as to part, occupiers, of a farm within the forest; that the whole of the forest was subject to rights reserved by the Crown on granting the manors, and that the Crown had reserved an absolute right of disposition over the herbage; that the lords of manors within the forest could not inclose with the consent of their respective homages without licence from the Crown; that the government of the forest was formerly administered by forest Courts, whose jurisdiction embraced all matters touching the preservation of the rights of the Crown in the forest; that by virtue of ancient forest laws made by the Crown, the owners of lands and tenements within the forest had enjoyed rights of common of pasture over the wastes of the forest; that such rights had from time immemorial been enjoyed by the owners and occupiers of such lands and tenements, without regard to the boundaries of the manors or parishes in which the lands and tenements were situate; and that the Plaintiffs and their predecessors in title, and their tenants, and the other owners and occupiers of lands and tenements within the forest, had from time immemorial enjoyed as of right by virtue of the said forest laws, as appendant or appurtenant to their respective lands and tenements, common of pasture, for cattle, levant and couchant, on their respective tenements, over the waste lands of the forest. The bill prayed for a declaration of the right claimed, and for an

RIGHT OF COMMON—*continued.*
injunction restraining the Defendants from inclosing any of the waste lands, and from allowing any parts which had been already inclosed to remain so :—*Held* (affirming the decision of the Master of the Rolls), that the right alleged was one which might exist by law, and was sufficiently pleaded; that the bill was not objectionable as being on behalf of occupiers as well as owners; that the persons who claimed to be owners of the lands alleged to have been improperly inclosed were sufficiently represented; and that as the bill was filed to establish one general right, the Defendants could not successfully demur on the ground that they might have separate defences. COMMISSIONERS OF SEWERS OF THE CITY OF LONDON *v.* GLASSE - - - - - 456

RULE IN SHELLEY'S CASE—*Estate of Trustee.*] Land was conveyed to a trustee, his heirs and assigns, to certain uses; and after the determination of those uses, to the use of the trustee, his heirs and assigns, upon trust to receive the rents and profits and pay them to *A.*, a married woman, for her separate use, and after the determination of that estate to stand seised of the said land, to such uses and upon such trusts as *A.* should by will appoint, and in default of appointment, to the use of the heirs and assigns of *A.* :—*Held* (reversing the decision of the Master of the Rolls), that (though the construction might be otherwise on a will) the trustee took the legal estate in fee, and that *A.* took an equitable estate for life, with an equitable remainder to her heirs and assigns, which two estates united according to the rule in *Shelley's Case* (1 Rep. 93), and gave her the equitable estate in fee. COOPER *v.* KYNOCK - - 398

SALE—Commission in army—Mortgage of proceeds - - - - - - 109
See MORTGAGE OF COMMISSION.

—— Public-house - - - - - 12
See SALE OF PUBLIC-HOUSE.

SALE OF PUBLIC-HOUSE—*Specific Performance—Transfer of Licence*—9 *Geo.* 4, *c.* 61, *ss.* 11, 14—*Time of the Essence of the Contract—Licence in the name of a Dead Man.*] Upon the sale of a public-house as a going concern time is of the essence of the contract. Where, therefore, upon the day for the completion of the contract the vendors were not in a position to transfer the licence under the 9 Geo. 4, c. 61, s. 11, the purchaser was held entitled to repudiate the contract. —The executors of the late owner of a public-house renewed the licence in the name of the deceased owner :—*Held*, that the licence was absolutely void, and that the executors could not make a good title to the public-house.—Decree of the Master of the Rolls reversed.—*Day* v. *Luhke* (Law Rep. 5 Eq. 336) followed. COWLES *v.* GALE - - 12

SCRIPHOLDER — *Company* — *Shareholder* — *Removing Name from Register.*] The Plaintiff applied for scrip in a company, the prospectus of which stated that on registration of the scrip, of which due notice would be given, the £50 scrip certificates would be divided into shares of £10 each. One hundred scrip certificates were allotted to the Plaintiff, and he paid the deposit thereon. The company afterwards brought an action against him for money due on calls in respect of 500 shares, to which he pleaded that he was not a shareholder. He afterwards attended a meeting of the company, and signed proxy-papers for votes at another meeting. His name had been placed on the register as a holder of 500 shares, but no notice of this was given to him until long afterwards :—*Held* (affirming the decree of the Master of the Rolls), that the Plaintiff was entitled to have his name removed from the register of shareholders :—*Quære*, whether he could, as against creditors of the company, have contended that he was not a shareholder. MCILWRAITH *v.* DUBLIN TRUNK CONNECTING RAILWAY COMPANY - 134

SECOND MARRIAGE—"Unmarried" - 7
See FUTURE HUSBAND.

SECURED CREDITOR—Proof in bankruptcy 760
See CREDITOR HOLDING SECURITY.

SECURITY FOR COSTS—*Practice—Cross Suit—Limited Company—Companies Act*, 1862, *s.* 69.] The *I.* society filed a bill against the *M.* company to foreclose a mortgage comprising nearly the whole of the effects of the *M.* company. At this time the *M.* company was in process of being wound up under the supervision of the Court. By leave of the Court in the winding-up, a bill was filed in the name of the *M.* company against the *I.* society, praying that it might be declared that the mortgage deed was not binding on the *M.* company, or its bondholders or shareholders: but that, if the Court held it to be a good security, certain renewed bills might be excluded from its operation, and that it might be declared a security only for bills of exchange accepted by the *I.* society; and that, in estimating the debt covered by it, no bills accepted by persons or firms other than the *I.* society might be included; and that an account might be taken on this footing of what was due; and that the *M.* company might be allowed to redeem on payment of what should be so found due :—*Held*, by the Master of the Rolls, that whether this was a purely cross bill or not, the Plaintiffs in it must give security for costs; and, *semble*, it was not a purely cross bill :—*Held*, on appeal, that the bill was not a mere cross bill; that the case was governed by *Washoe Mining Company* v. *Ferguson* (Law Rep. 2 Eq. 371); and that security for costs must be given.—*Semble*, that even had it been a pure cross bill, security for costs must have been given, as it was filed in the name of a company which was being wound up. CITY OF MOSCOW GAS COMPANY *v.* INTERNATIONAL FINANCIAL SOCIETY - 225

—— Solicitor — Company — Unregistered mortgage - - - - - 289
See UNREGISTERED MORTGAGE.

SECURITY FOR DEBT—Debtor summons—Bankruptcy - - - - 319
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SEPARATE ESTATE—Contract by wife respecting power of wife over - - - 64
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SEPARATE ESTATE—*continued.*
—— Impeachment of waste—Restraint on anticipation - - - - 433
See Impeachment of Waste.

SEPARATION DEED—Contract concerning wife's property - - - - 64
See Acknowledgment by Married Woman.

SETTING ASIDE DEED—Jurisdiction of bankruptcy - - - - 494
See Bankruptcy Jurisdiction. 2.
—— Undue pressure—Breach of trust - 104
See Undue Pressure.
—— Voluntary settlement - - - 329
See Voluntary Settlement. 2.

SETTLED ESTATES ACT (19 & 20 *Vict.* c. 120, s. 37—*Married Woman—Infant—Consent.*] For the purposes of the *Settled Estates Act* a married woman who is under age is in the same position as if she were of full age, and must be examined under sect. 37. It is not sufficient for her to concur in the Petition as an infant by a special guardian. *In re* Broadwood's Settled Estates 323

SETTLEMENT—Advancement—Purchase of commission - - - - 727
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—— Legal representatives, meaning of - 376
See "Legal Representatives."
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—— Transfer of - - 292, 296, n., 485
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SHIP—Mortgage - - - - - 507
See Mortgage of Ship.

SOIL OF HIGHWAY—*Right of adjoining Landowner ad medium filum viæ—Street in a Town—Borough English Tenure—Presumption.*] The right of the owner of land abutting on a highway to the soil of the highway *ad medium filum viæ* is founded on a presumption of law which exists only in the absence of evidence of ownership.—Whether such presumption has any application to a street in a town, *quære*:—*Held*, in a suit between the lords of the manor and the corporation of *Leeds*, that the soil of the *Briggate*, an ancient street in the borough of *Leeds*, belonged to the lords of the manor, there being sufficient evidence to rebut the presumption of ownership in the owners of the adjoining houses.—Decision of the Master of the Rolls reversed. Beckett *v.* Corporation of Leeds - - - 421

SOLICITOR—Committal under Debtors Act 523
See Committal under Debtors Act.
—— Fraud—Execution of deed - - 75
See Priority from Negligence.
—— Fraud—Execution of deed - 79, n.
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—— Security for costs—Company—Unregistered mortgage - - - - 289
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—— Uncertificated—Costs payable to - 766
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—— Lien on property recovered - - 773
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—— Lien—Appeal—Trivial amount - 221
See Appeal for Small Amount.

SOLICITOR'S LIEN—*Charge on Property recovered—23 & 24 Vict. c. 127, s. 28—Useless Suit—Suit no longer pending—Recital in Deed by Married Woman—Estoppel.*] A solicitor is entitled to a charge for his costs on property the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance be entirely valueless, provided it formed a cloud upon the title.—It is no objection to an application for such a charge that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property has been sold before the application of the solicitor.—*Semble*, a married woman is bound by estoppel by a recital in a deed duly executed and acknowledged by her, in the same manner as if she were a *feme sole.*—Order of the Master of the Rolls affirmed. Jones *v.* Frost. *In re* Fiddey - - 773

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SPECIFIC LEGACY—Share of partnership property - - - - - 1
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SPECIFIC PERFORMANCE—Doubtful title 7
See Future Husband.
—— Railway company—Compulsory sale - 154
See Compulsory Powers. 1.
—— Time of the essence of contract - 12
See Sale of Public-house.

SPECIFICATION OF PATENT—*Anticipation—Combination—Useless Machine.*] Where a machine for which a patent had been granted was shewn to produce work more expeditiously, more economically, and of a better quality than any previous machine:—*Held* (reversing the decision of *Bacon*, V.C.), that the patent could not be invalidated on the ground that the machine was formed by the mere arrangement of common elementary mechanical materials, producing results of the same nature as those previously accomplished by other mechanical arrangements and construction. The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine. *Foxwell* v. *Bostock* (12 W. R. 723) considered. Murray *v.* Clayton - - - - - - 570

STANDING BY AND ALLOWING BUILDING—Contract with railway company not under seal - - - - - 562
See Contract by Corporation.

STATEMENT TO DISCREDIT WITNESS—*Practice—Evidence—Admissibility—Purchase of Shares in Name of a Trustee—Suit by Liquidator in Name*

STATEMENT TO DISCREDIT WITNESS—*cont.*
of Contributory for Indemnity.] A witness, who made an affidavit on behalf of the Plaintiff, had previously made a statement, which the solicitor for the Defendant had taken down in writing, and alleged to be inconsistent with his affidavit. The solicitor filed an affidavit on behalf of the Defendant, and made this statement an exhibit:—*Held*, that the exhibit was not admissible in evidence. Hemming *v.* Maddick - - - 395

STATUTES:

21 Jac. 1, c. 16—*Limitations* - 17, 646
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29 Car. 2, c. 3—*Frauds* - - 469
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53 Geo. 3, c. 52, s. 20—*Legacy Duty* 192
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9 Geo. 4, ss. 11, 14—*Public-houses* - 12
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3 & 4 Will. 4, c. 74, s. 72—*Fines and Recoveries* - - - - 64
See Acknowledgment by Married Woman.

4 & 5 Will. 4, c. 22—*Apportionment* - 433
See Apportionment where no Death.

5 & 6 Vict. c. 55. s. 4—*Railways* - 767
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6 & 7 Vict. c. 73, s. 26—*Attorneys* - 766
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8 Vict. c. 20, ss. 13, 14—*Railway Clauses* 475
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10 & 11 Vict. c. 96—*Trustee Relief Act* 609
See Trustee Relief Act.

12 & 13 Vict. c. 106, s. 178—*Bankruptcy* 35
See Proof for Contingent Liability.

13 & 14 Vict. c. 60, s. 32—*Trustee Act* 223
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15 & 16 Vict. c. 86, s. 44—*Chancery Improvement* - - - - - 634
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17 & 18 Vict. c. 104, ss. 67, 70—*Merchant Shipping* - - - - 507
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23 & 24 Vict. c. 124, s. 38—*Ecclesiastical Commissioners* - - - - 50
See Ecclesiastical Commissioners.

23 & 24 Vict. c. 127, s. 28—*Attorneys* 221
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—— —— —— - - - 773
See Solicitor's Lien.

24 & 25 Vict. c. 134, s. 152—*Bankruptcy* 490
See Bankruptcy in two Countries.

—— —— s. 153 - - - - 35
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25 & 26 Vict. c. 86, ss. 12, 13—*Lunacy Regulation* - - - - - 53
See Maintenance of Lunatic.

25 & 26 Vict. c. 89, s. 38—*Companies* 200
See Past Members.

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25 & 26 Vict. c. 89, s. 43 - - 289
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—— —— s. 69 - - - - 225
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—— —— ss. 75, 77 - - - 324
See Bankrupt Shareholder.

—— —— s. 98 - - - - 646
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—— —— s. 160 - - - 309
See Compromise by Liquidator.

25 & 26 Vict. c. 102, ss. 74, 75.—*Metropolis Management Act* - - - 597
See General Line of Buildings.

27 & 28 Vict. c. 112, s. 4.—*Judgments* 174
See Superfluous Lands.

31 & 32 Vict. c. 68.—*Liquidation Act* - 760
See Creditor holding Security.

32 & 33 Vict. c. 56, ss. 5, 14.—*Endowed Schools* [500
See Endowed Schools Commissioners.

32 & 33 Vict. c. 62, s. 4.—*Debtors* - 523
See Committal under Debtors Act.

32 & 33 Vict. c. 71, s. 6.—*Bankruptcy* 302
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—— —— s. 12 - - - 314
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—— —— s. 87 - - - 325, 732
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—— —— s. 92 - - - - 24
See Fraudulent Preference.

—— —— s. 122 - - - 519
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—— —— s. 125 - - - 724, n.
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—— —— s. 126 - - - 521
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—— —— —— - - - - 723
See Injunction in Bankruptcy. 2.

—— c. 83, s. 20 - - - - 534
See Mortgage of Partnership Property.

33 Vict. c. 14, ss. 2, 18.—*Aliens* - 343
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33 & 34 Vict. c. 35.—*Apportionment* - 433
See Apportionment where no Death.

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34 & 35 Vict. c. 86.—*Regulation of Forces* 727
See Failure of Purpose of Gift.

STOCK EXCHANGE—Custom of - - 733
See Custom of Stock Exchange.

STOPPING UP STREETS—Railway company 475
See Compulsory Powers. 2.

STREET IN TOWN—Right to soil of highway
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SUBMISSION TO JUDGE—Appeal—Winding-up [45
See Appeal from Submission to Judge.

SUPERFLUOUS LANDS—*Judgment Creditor—27 & 28 Vict. c. 112, s. 4—Railway Company—Separate Undertakings.*] An existing railway company was authorized to make an extension line, by an Act which enacted that the capital might be raised by an issue of new shares, to be called extension shares, and that the works authorized by it should, "for financial purposes, form a separate undertaking," and that the capital and new shares created under its powers should constitute a separate capital; and that the profits of the extension line applicable to dividend should be wholly applied in payment of dividend on the extension shares; and that the extension shareholders should not be entitled to dividends out of any other profits of the company, and that the company might raise by mortgage any additional sums not exceeding £28,000; but not till all the extension capital had been subscribed for and half of it paid up; and that the money raised by new shares or mortgage, should be applied only for the purposes of the extension Act. A contractor, to whom the company was indebted in respect of the construction of the original line, obtained judgment against the company, extended certain surplus lands acquired under the powers of the extension Act, and then applied to the Court for a sale:—*Held* (affirming the decision of *Wickens,* V.C.), that the creditor was entitled to an order for sale; for that, whatever might be the rights of the different classes of shareholders *inter se*, the lands were lands of the company, liable to be sold for payment of any judgment debts of the company. *In re* Ogilvie [174

SURETY—Discharge of—Giving time - 142
See Discharge of Surety.

—— Promissory note—Proof in winding-up 680
See Proof by Surety.

TACKING—Mortgage on ship—Lien on freight
See Mortgage of Ship. [507

TAXATION OF COSTS—*Three Counsel.*] Where a junior counsel who has prepared the pleadings for a party to a cause is called within the bar before the hearing, and after a leader has been retained, then, if the case is of such a description as to make the retaining a leader at that stage of the cause proper, the costs of three counsel at the hearing ought to be allowed. Cousens *v.* Cousens [48

2. —— *Three Counsel — Perusing Affidavits.*] Where a leader has been employed in a suit but not retained, the costs of employing him as third counsel at the hearing will not be allowed as between party and party, although the junior counsel who drew the pleadings has before the hearing been called within the Bar.—*Cousens* v. *Cousens* (Law Rep. 7 Ch. 48) observed upon.—A similar affidavit was filed by the Plaintiff in each of several suits. The solicitor for the Defendants took an office copy of the affidavit in one suit only, and examined at the Record Office the affidavits in the other suits:—*Held*, that he was not entitled to charge for perusing the affidavits in the other suits.—Decision of *Bacon*, V.C., reversed. Betts *v.* Cleaver - - - 513

3. —— *Uncertificated Solicitor — Costs.*] A person who has been ordered to pay costs cannot, on the ground that the solicitor on the other side was uncertificated, refuse to pay the costs.—Order of the Master of the Rolls affirmed. *In re* Hope [766

TIME—Appeal—Bankruptcy - - 730
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—— When of the essence of the contract - 12
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TOWN IMPROVEMENT COMMISSIONERS—Bonds - - - - 655
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TRADE-MARK—*Forged Trade-mark—Injunction—Agent—Costs—Costs of Respondent.*] A firm of forwarding agents in *London* received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in *England.* On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars or to erase the brands:—*Held* (affirming the decree of the Master of the Rolls), on a bill for injunction filed by the makers whose brands were forged, that the fact of the agents being merely carriers was no defence to the suit; but that as they had given sufficient information, and offered to erase the brands, they were not to pay costs.—The Appellant gave notice to a Respondent whose costs the Appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs:—*Held,* that the Respondent was not entitled to his costs of appearing on the appeal. Upmann *v.* Elkan - - 130

2. ——*Fancy Name becoming Publici Juris—Use of Name in Trade Circulars—Misrepresentation in Trade-mark.*] A fancy name which designates a particular kind of article may be in general use in price lists which circulate between manufacturers and retail dealers without prejudicing the right of the inventor to the exclusive use of the fancy name as a trade-mark in the sale of the article to the public.—A trade-mark to which a trader had originally an exclusive right may in course of time become *publici juris*, and the exclusive right may be lost. The proper test of this having happened is, that the use of the trade-mark by other persons has ceased to deceive the public as to the maker of the article.—The exclusive right to the use of a fancy name as a trade-mark is not lost by the inventor habitually using it in conjunction with his own name as maker of the article.—The Court will not interfere by injunction to restrain the imitation of a trade-mark, if there is false representation in the trade-mark, or

TRADE-MARK—*continued.*
if the trade itself is fraudulent.—And, *semble*, such false representation or fraud would be a good defence to an action at law for imitation of the trade-mark, on the ground that *ex turpi causâ non oritur actio.*—But a collateral misrepresentation by the owner of the trade-mark will not disentitle him to relief either at law or in equity.—In a case where the Plaintiff, whose trade-mark was "*Ford's Eureka Shirt*," had falsely represented in his invoices and in a few advertisements that he was a "patentee" of the shirt:—*Held*, that such false representation was not sufficient to prevent him from sustaining an action at law; and that his right at law being clear, he was entitled to an injunction in Chancery.—Decision of *Bacon*, V.C., reversed. FORD *v.* FOSTER - - - 611

—— Infringement—Discovery of name of customers - - - 90, 94, n.
See DISCOVERY INJURIOUS TO DEFENDANT.

TRANSFER OF BUSINESS—Life insurance company - - - - - 651
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TRANSFER OF LICENCE—Public-house - 12
See SALE OF PUBLIC-HOUSE.

TRANSFER OF PROCEEDINGS IN BANKRUPTCY—Registration - - 526
See EXTRAORDINARY RESOLUTION OF CREDITORS.

TRANSFER OF SHARES—*Company—Contributory—Bonâ fide Transfer—Misdescription of Transferee.*] Twelve days before a banking company stopped payment, one of the shareholders in the company transferred to his son-in-law, a journeyman butcher, 280 shares, on which £15 a share had been paid, and £35 was payable, and which were then saleable at £8 to £6 a share. In the transfer deed the transferee was described as "gentleman." The transfer was duly registered by the company:—*Held*, upon an application nearly five years after the transfer, to have the name of the transferor substituted for that of the transferee on the list of contributories, that, under the circumstances, the transfer was a *bonâ fide* gift to the son-in-law, that the misdescription of the transferee was not material, and that the transaction could not be disturbed.—Decision of *Malins*, V.C., reversed. *In re* EUROPEAN BANK. MASTER'S CASE - - - - - 292

2. —— *Description of Transferee.*] The circumstance that the transferee, who was a person of no means, was described as a "gentleman," *held* not to invalidate a transfer. *In re* FINANCIAL INSURANCE COMPANY. BISHOP'S CASE 296, n.

3. —— *Special Stipulations.*] Transfer by a shareholder in order to escape liability *held* valid, although accompanied by special stipulations between the transferor and transferee. *In re* SMITH, KNIGHT, & CO. HAKIM'S CASE - 296, n.

4. —— *Company—Winding-up—Rectification of Register—Error in distinguishing Numbers of Shares.*] In a transfer of shares in a joint stock company an error in the distinguishing numbers of the shares is immaterial, provided the transferor has at the time a sufficient number of shares in the company.—Fifty shares were transferred by the chairman of a company to *A.*, as a trustee for the company numbered as therein stated, and *A.*'s name was placed on the register in respect of those shares. The transferor had at the time no shares bearing those numbers, but he had fifty shares bearing other numbers:—*Held* (affirming the decision of *Wickens*, V.C.), that *A.* must be on the list of contributories for fifty shares. *In re* INTERNATIONAL CONTRACT COMPANY. IND'S CASE 485

—— Custom of Stock Exchange - - 733
See CUSTOM OF STOCK EXCHANGE.

TRANSFER OF SUIT — *Practice — Concurrent Suits—Costs.*] When a bill has been filed in one branch of the Court, and a second bill relating to the same estate has been filed in another branch, the second suit, even when a decree in it has been obtained, will be transferred to the branch of the Court in which the first bill was filed, and the Plaintiffs in the second suit will pay the costs of the application for transfer. LUCAS *v.* SIGGERS. GRAY *v.* SIGGERS - - - - 517

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—— Wife and children—Joint tenancy - 253
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TRUSTEE—Appointment of new - - 223
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—— Contributory—Indemnity by *cestui que trust* —Suit by liquidator - - 395
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—— Creditors' deed—Right to sue strangers 71
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—— Legal estate—Distinction between deeds and wills - - - - - 398
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—— Undue pressure to induce execution of deed
See UNDUE PRESSURE. [104

TRUSTEE ACTS—*Appointment of New Trustees—"Incapable to act"—Residence Abroad—Trustee Act*, 1850, *s.* 32.] The Court has power, under the 32nd section of the *Trustee Act*, 1850, to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent.—*Semble*, a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad.—*Re Blanchard* (3 D. F. & J. 131) explained. *In re* BIGNOLD'S SETTLEMENT TRUSTS - - - - - 223

TRUSTEE OF CREDITORS' DEED—*Demurrer—Execution of Deed—Voluntary Deed—Right of Trustee to sue.*] A bill stated that, by an indenture made between *A.*, of the first part, *B.*, of the second part, and the several other persons whose names and seals were, or were intended to be, thereunto subscribed as creditors of *A.*, of the third part, *A.* assigned all his personal estate to *B.* upon trusts for the creditors of *A.*:—*Held*, on demurrer (affirming the decision of the Master of the Rolls), that this was not an averment of the execution of the deed by any of the creditors:—*Held*, that the deed nevertheless would operate as an assignment of the personal estate, so as to enable *B.* to maintain a suit against a trustee to

TRUSTEE OF CREDITORS' DEED—*continued.* whom certain personal estate had been assigned in trust for *A.*; and that the creditors need not be parties to the suit.—Decision of the Master of the Rolls reversed.—*Garrard* v. *Lord Lauderdale* (2 Russ. & My. 451) discussed. Glegg *v.* Rees 71

TRUSTEE RELIEF ACT—*Petition for payment of Income—Costs.*] Where a trust fund has been transferred into Court under the *Trustee Relief Act*, and a petition is presented for payment of the income to the tenant for life, the costs of the trustees, as well as of all other necessary parties, will be paid out of the income.—Decision of *Malins*, V.C., reversed.—*In re Marner's Trusts* (Law Rep. 3 Eq. 432) followed.—*Semble:* Where the title of the tenant for life is clear, the trustees ought not to appear upon a petition simply affecting the income. *In re* Evans' Trusts - - 609

UNAUTHORIZED DEALING IN SHARES—*Company—Misapplication of Funds by Directors—Borrowing Powers—Rigging the Market—Notice—Common Directors and Solicitor.*] Two directors of *Company A.* were also directors of *Company B.*, and both companies employed the same solicitor. *Company A.* owed money to their contractor, which, however, was not payable immediately. The contractor had bought shares in the company and was pressed by the stockbrokers for the money. *Company A.* agreed to advance him £7000, and borrowed the money from *Company B.* on the security of a mortgage. The loan was negotiated by one of the persons who was a director of both companies, and the solicitor who acted for both companies prepared the mortgage. *Company A.* had power under the articles to borrow money, but were not authorized to buy up their own shares. Both companies afterwards were wound up:—*Held* (reversing the decision of *Malins*, V.C.), that *Company B.* were not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, and that they were consequently entitled to prove against the estate of *Company A.* under the winding-up. *In re* Marseilles Extension Railway Company. *Ex parte* Crédit Foncier and Mobilier of England 161

UNCERTIFICATED BANKRUPT—*Bankruptcy—After-acquired Property—Payment by Bankrupt—Following Money.*] Money received by an undischarged bankrupt and paid away for value cannot be followed by the trustee, though the person to whom the money was paid had notice of the bankruptcy.—A bankrupt, who had not obtained his order of discharge, took a furnished house at £5 per week from a person who had notice of the bankruptcy, on the terms of paying six months' rent in advance if required. Having obtained a sum of £200 as compensation for being turned out of an appointment which he had taken since the bankruptcy, he paid to the landlord out of this sum £130 as the six months' rent, the landlord having required payment:—*Held* (affirming the decision of *Bacon*, C.J., who had reversed the decision of the County Court of *Lancashire*), that though the trustee in bankruptcy could have intercepted the £200 and required it to be paid to him, he could not follow any part of it into the hands of the landlord. *Ex parte* Dewhurst. *In re* Vanlohe - - - - 185

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UNDUE PRESSURE—*Setting aside Deed—Trustee.*] A testator by his will desired his trustees to give up his farm to his nephew, the Plaintiff, if the landlord would accept him as tenant; and in that case he bequeathed to him the farming stock. He also gave some real property to the Plaintiff, and gave legacies and annuities to the Plaintiff's father, mother, and sisters, and other persons, including the trustees. One of the trustees of the will was steward to the landlord. There were hardly any assets to pay the legacies and annuities if the Plaintiff took the farming stock, upon which the trustees represented the case to the landlord, who left it to their decision whether the Plaintiff should be accepted as tenant. They accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate to pay the legacies and annuities:—*Held* (affirming the decision of the Master of the Rolls), that it was a breach of trust on the part of the trustees to endeavour to induce the landlord to refuse his consent to the Plaintiff having the tenancy, which the testator had by his will expressed his wish for him to have; and that the deed, having been obtained by means of that breach of trust, must be set aside; and that the trustees, having made the suit necessary, and hostilely contested the Plaintiff's right to relief, must pay the costs of the suit. Ellis *v.* Barker [104

UNREGISTERED MORTGAGE—*Companies Act, 1862, s. 43—Duty of Solicitor.*] A solicitor not usually employed by a company was employed by them to act in a particular matter, and, having required security for costs, they gave him a charge on certain debts due to them. About five weeks after this a winding-up Petition was presented, on which an order was shortly afterwards made. The charge had not been registered:—*Held* (affirming the decision of the Master of the Rolls), that though under the *Companies Act*, 1862, s. 43, the want of registration did not make the charge void, yet that the solicitor could not avail himself of the charge, for that it was his duty, as being the solicitor of the company in this transaction, to see that the directions of the Legislature as to registration were obeyed. *In re* Patent Bread Machinery Company. *Ex parte* Valpy & Chaplin - - - - 289

UNSOUND MIND—Person of—Lease by Ecclesiastical Commissioners — Jurisdiction of Chancery and Lunacy - - 50
See Ecclesiastical Commissioners.

—— Person of—Maintenance - - 53
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VACANT LAND — General line of buildings—Board of Works - - - 597
See General Line of Buildings.

VACATION OF INROLMENT—*Practice—Rehearing—Application by a Person not a Party to the Suit.*] A bill was filed by a former officer of a railway company to obtain the distribution of a sum of money which had been set apart for compensation of the officers of the company on

VACATION OF INROLMENT—*continued.*
its amalgamation with another company. By the decree the Court declared the Plaintiff entitled to a share in the fund, and directed an inquiry as to what other persons were entitled to share, and in what proportions. None of the other officers of the company were served with notice of the decree, but advertisements were issued, and the decree was inrolled. *A.* came in under the decree and claimed a share in the fund, and also desired to dispute the right of the Plaintiff to any share at all;—*Held*, that *A.* was a *quasi* party to the suit, and was entitled to have the cause reheard for the purpose of varying the decree; and that the inrolment ought to be vacated in order to enable him to present a petition of rehearing. BRUFF *v.* COBBOLD - - - - 217

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VOLUNTARY GIFT—Resulting trust - 469
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VOLUNTARY SETTLEMENT—*Clauses—Explanation—Power of Revocation.*] In order to support a voluntary settlement, it must be shewn that all the provisions are proper and usual; or if there are any unusual provisions, that they were brought to the notice of and understood by the settlor.—No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is not essential.—A young man of improvident habits, being entitled to a sum of money, was induced by the trustee of the money, and by a solicitor, to execute a settlement by which he assigned a part of the money to trustees on trust to invest and to pay him during his life the income on such part thereof as they should think fit, and after his death on trust to hold the same for his wife and children, if any, and subject thereto on trust for certain cousins of his. He had no power of appointment in default of issue, and no power of revocation, and no power to appoint new trustees. The deed was explained to him, and the particular clauses were brought to his notice:—*Held* (affirming the decree of *Stuart*, V.C.), that the deed could not be set aside by the settlor.—*Coutts* v. *Acworth* (Law Rep. 8 Eq. 558); *Wollaston* v. *Tribe* (Law Rep. 9 Eq. 44); *Everitt* v. *Everitt* (Law Rep. 10 Eq. 405), considered. PHILLIPS *v.* MULLINGS - - - 244

2. —— *Setting aside Deed of Gift—Knowledge—Undue Influence—Delay—Part of Deed.*] In order to maintain a voluntary deed of gift from a son for the benefit of a father, it must be shewn both that the son understood the contents of the deed and that he was not under undue parental influence.—A voluntary deed of gift cannot, after unreasonable delay, be set aside, though the gift was of a reversion and remained a reversion.—Part of a voluntary settlement may be set aside.—Under a marriage settlement, the son of the marriage was entitled to the reversion expectant on the life estate of the father in two sums of money, one of which had come from the father's side, the other from the mother's side. The son had also a large income under the will of his grandfather, and would have a much larger income on attaining the age of twenty-five years. The son had lately attained the age of twenty-one years, and was residing with his father. The son, without employing a separate solicitor, executed a deed giving to his father's second wife and her daughter the reversion in both the sums which were included in the marriage settlement, and giving to the father power to appoint the sum which came from the mother's side to any third wife and her children. The son left the father's house five years after the execution of the deed, and employed a separate solicitor two years afterwards, when the subject of setting aside the deeds were mentioned. Seven years afterwards the son filed a bill to set aside so much of the deed as related to the sum which had come from the mother's side:—*Held*, on the facts of the case, that though the son understood all the contents of the deed except the power to appoint to a third wife and her children, he was not sufficiently protected from parental influence, and that if the bill had been filed at an earlier time the deed must have been set aside to the extent prayed, but:—*Held*, that, as the filing of the bill had been so long deferred, the deed must be rectified only by striking out the power.—Decree of *Malins*, V.C., varied. TURNER *v.* COLLINS [329

WASTE—*Deceased Tenant for Life—Injunction—Account—Statute of Limitations.*] A tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both having committed waste by cutting timber:—*Held*, that the *Statute of Limitations* began to run against the remaindermen in fee from the time when the timber was cut, and not from the time of the death of the tenant for life:—*Held*, that though an injunction and an account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her executrix for waste committed by the preceding tenant for life.—Decree of *Bacon*, V.C., varied. HIGGINBOTHAM *v.* HAWKINS - 676

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